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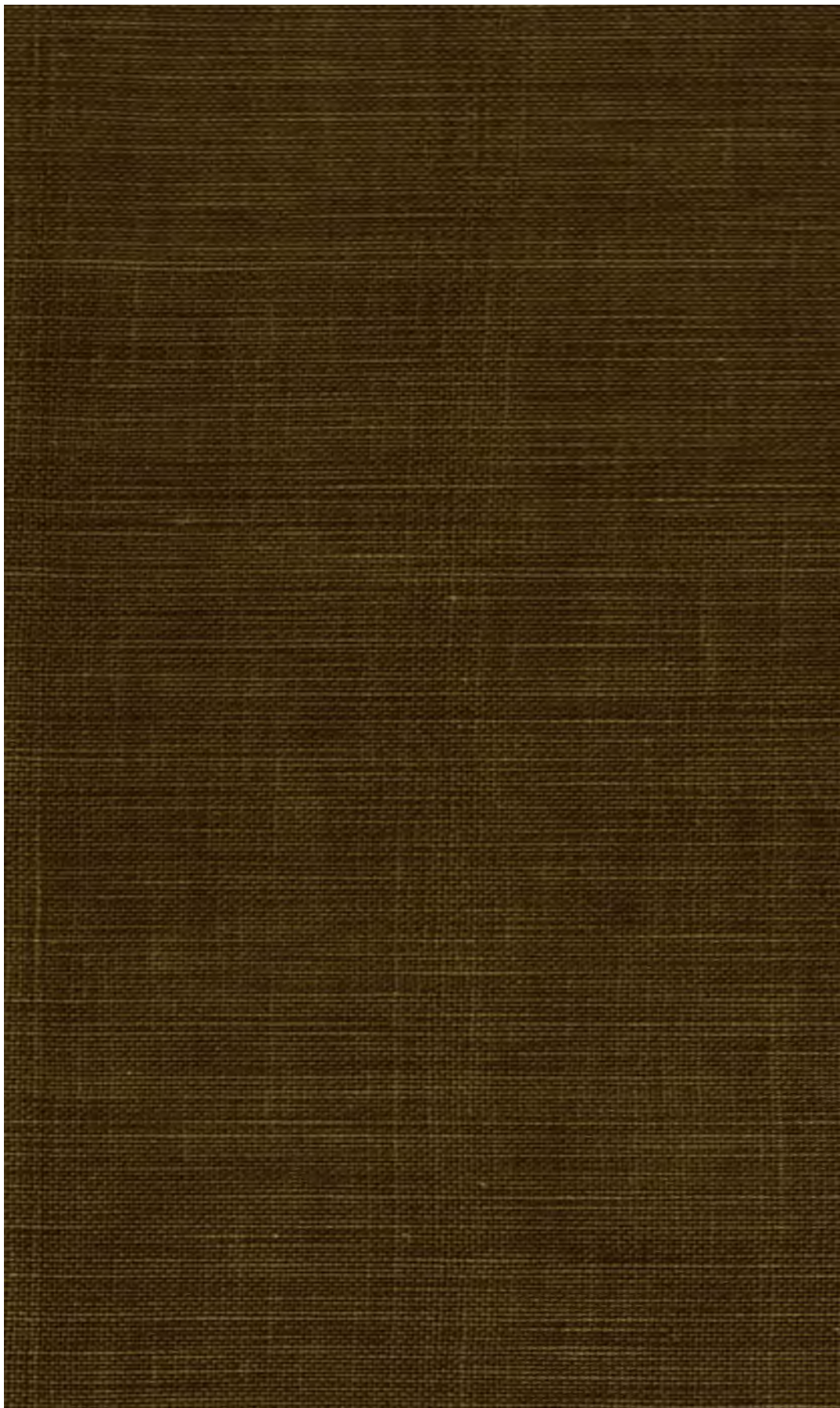
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THE
MINING REPORTS.

CONTAINING RECENT CASES ON THE
LAW OF MINES
WITH
INDEX-DIGEST

APPENDED
OF ALL THE CASES IN THE ENTIRE SERIES, INCLUDING
THIS SUPPLEMENTAL VOLUME.

By R. S. MORRISON,
OF THE COLORADO BAR.

VOL. XVI.

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MINING REPORTS.

VOL. XVI.

JEFFERSON McCaULEY, Appellant, v. DAVID
McKEIG, Respondent.

(8 Montana, 389; 21 Pac. Rep. 22. Supreme Court, 1889.)

Working one out of several years. Defendant, a prior appropriator of water, made no use of it in the years 1878, '79, '80, '82 or '83, but did use it in the intervening year 1881; and there was evidence that during some of those years there was not water enough to work. *Held*, that proof of abandonment was not made out.

No injunction against slight damage from tailings. Slight injury to land, and water rights below, by the fouling incidental to placer mining, will not be enjoined.

General, corrected by special verdict. The fact that in an equity case the jury are allowed to return a general verdict is harmless error, where they also return special findings for the same party, which are accepted by the court, and on which judgment is rendered.

Cause not remanded for nominal damages. A case will not be reversed and remanded to the lower court to direct a judgment for nominal damages in favor of appellant.

Appeal from District Court, Silver Bow County.

Action by Jefferson McCauley against David McKeig.
Judgment for defendant, and plaintiff appeals.

KNOWLES & FORBES, for appellant.

W. W. DIXON, for respondent.

BACH, J.

¹ *Richards v. Dower*, 81 Cal. 44; *Kirman v. Hunnewell*, 29 Pac. 124.

This is an action setting forth in one complaint two causes of action for two separate nuisances. The first is for the diversion of water from the ditch and land of plaintiff. The second is for running down tailings, sand and dirt, into plaintiff's ditch, and upon his land. The prayer is for damages and for an injunction to abate both nuisances. The defendant denied all the allegations of the plaintiff's complaint, and set up title in himself to the water diverted, and also a right by prescription to run down tailings upon plaintiff's land. The jury returned a general verdict in favor of the defendant and made special findings covering the issues in the case. The following summary of the special findings will present all the facts in issue: The defendant appropriated the water of Soap creek in controversy, for the purposes of placer mining in 1869, and has never abandoned the same. The plaintiff did not appropriate or use said waters until 1872. The defendant has not used said waters since 1872 in any manner differing from his use of the same prior to that date. In 1886 (the year complained of) the defendant did not so use the water as to occasion any loss of water not incidental to his use of the same for placer mining purposes. During that time he did not so use the same as to cause it to carry down any more sand, gravel, sediment or tailings than is usual from the use of water in placer mining. In 1886 plaintiff's ditch was filled up, and tailings, sand and gravel were deposited on his land, which was partly caused by the mining operations of the defendant resulting from the ordinary use of water for placer mining. The plaintiff is the owner of the land mentioned in the complaint, and in 1872 he appropriated said waters for irrigating the same. The use of the waters by defendant, as aforesaid, does not cause any injury to the lands or ditches of the plaintiff, or to the water used by him; and the plaintiff has acquired no right to said water adverse to the right of defendant. After the return of the general verdict and special findings, counsel for defendant moved the court to approve and adopt the special findings, and to render judgment for defendant for costs. The court granted the motion, and judgment was ordered for defendant. A motion for a new trial was made

and denied. The appeal is from the judgment and from the order denying a new trial. There are practically three demands made by plaintiff in his complaint: (1) He asks that the defendant be perpetually enjoined from diverting certain waters; (2) he asks that defendant be restrained from turning the tailings from his placer mines into the creek, and thereby causing them to run into plaintiff's ditch; (3) he asks for damages. The order denying the motion for a new trial may well be considered separately with each of these several demands.

As to the prayer that defendant be restrained from diverting the waters, there is evidence tending to show that the defendant was the first appropriator; that he has never abandoned his right, and that the plaintiff has established no right adverse to the defendant. The jury did find, it is true, that defendant did not use any of said waters during the years of 1878, 1879, 1880, 1882 and 1883. They did, however, find that he used said waters during the year 1881; and the testimony shows that there was not water enough to work mines during certain of the years mentioned. We do not think that those facts establish an abandonment by the defendant. The judgment of the court below, denying the first relief demanded, is fully sustained by the evidence.

As to the second demand, there is evidence tending to show that some of the sand, gravel, and tailings do run into the ditch and upon the land of the plaintiff; that this is not due to any cause not a necessary incident to the use of water in placer mining; and also that no damage results therefrom to the plaintiff. We are not to be understood as declaring that the owner of a placer mine may disregard the rights of others owning property adjacent to his. But the public policy of this territory demands that a trifling—a nominal—damage shall not be ground sufficient to destroy one of its leading industries. The laws of the United States, from which power the plaintiff obtains his right, granted to defendant the right to use the water for placer mining purposes, and we think we have no power to deprive him of that right by enjoining him from doing that which is a necessary incident to the enjoyment thereof; certainly not at the request of one who is a subsequent purchaser from a com-

mon grantor. We think the court below properly refused a restraining order upon these facts, and for authority we rely upon the case of *Atchison v. Peterson*, 20 Wall. 507. That was an appeal from the Supreme Court of this territory. The plaintiff asked for an injunction against a subsequent appropriator, so that in that respect the case would present a stronger claim for injunction than does the case under consideration, in which it is a subsequent appropriator who seeks the remedy. The court say: "But whether, upon a petition or a bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irreparable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

As to the question of damages. It appears from the findings that the ditches of the plaintiff have been filled by sand and mud, part of which is due to the placer mining of defendant. The witnesses for plaintiff estimate the damage at sums varying from \$200 to \$500. They base their estimate upon the whole damage done. The jury, on the other hand, declare that only part of this is caused by the mining operations of defendant, and then declare that no damage was caused thereby. The plaintiff insists that he is entitled at least to nominal damage, and upon that ground also asks for a judgment of reversal. It would seem to be the law that one who establishes a nuisance is entitled to nominal damages at least; and then, in most cases, an injunction follows to prevent future damage of the same nature. But the case of *Atchison v. Peterson*, already cited, declares that the injunction does not follow as a matter of right in cases like the present, and we can see no reason why this case should be sent to the court below merely to direct a judgment for one cent in favor of the plaintiff; for, as to the other demands, we are of the opinion that the judgment of the court below is correct.

One more alleged error is much relied on by appellant,

who claims that this is an equity case, and that the jury should not have been asked or allowed to return a general verdict, and cites as authority cases from the California reports. The respondent, on the other hand, insists that there is a combination of a common law action with a suit in equity, and that the question of damages was properly made the subject of a general verdict, and cites as authority *Basey v. Gallagher*, 20 Wall. 680. This might, perhaps, afford a subject for learned discussion, but surely it should not be allowed to disturb a solemn judgment. In what respect was the plaintiff injured by the return of a general verdict? The record shows that the jury did return special findings; that the judge below, sitting as an equity judge, did solemnly accept this formal aid to his conscience, and did approve of the special findings; and the record further shows that upon such acceptance and approval judgment was entered in favor of the defendant.

The judgment and order appealed from are affirmed, with costs.

McCONNELL, C. J., and DE WOLFE, J., concur.

1. Abandonment is a question of intention and a general rule of property applied to mining rights. *Inez Co. v. Kinney*, 46 Fed. 832. A matter of intention and particularly within the province of the jury. *Marshall v. Harney Peak Tin Co.*, 47 N. W. 290.

2. Lessees quit work for several years: *Held*, that the owners were justified in considering the lease abandoned and reletting to others. *Porter v. Noyes*, 10 N. W. 77.

3. Cargo of coal sunk in lake is not abandoned. *Murphy v. Dunham*, 88 Fed. 503.

4. Where there is no question of abandonment in the case it is not error to refuse an instruction upon the question of abandonment. *Coleman v. Davis*, 21 Pac. 1018.

5. Insufficient proof that party had elected to abandon interest in lease. *Meagher v. Reed*, 24 Pac. 681.

THE MARSHALL SILVER MINING CO. ET AL., Appel-
lants, v. JEREMIAH KIRTLEY ET AL., Appellees.

(12 Colorado, 410; 21 Pac. 492. Supreme Court, 1888.)

The allegation in the complaint that the action is in support of an adverse claim determines the character of the action as one to test plaintiff's right to recover as the holder of a valid location of a mining claim, and to test the defendant's right to go to patent. Allegations in the answer, therefore, traversing the allegation that any adverse claim was filed on behalf of a certain mining claim, make a material issue.

Suit by vendee of adverse claimant. An adverse claimant, who has brought an action in support of his adverse claim, may be permitted by the court to bring in titles based on other adverse claims, by a supplemental complaint, if such adverses had been duly filed and suit brought within the time limited for bringing an action in support thereof, though he may have acquired the right to them by purchase after the commencement of the action.

¹**Suit not brought within thirty days.** The objection that the evidence shows that plaintiff did not bring the action in support of his adverse claim within thirty days after filing such claim, can not be raised for the first time in the Supreme Court.

Commissioners' decision. Appeal from District Court, Gilpin County.

This action was brought by appellees, who were plaintiffs below, against the Marshall Silver Mining Company, to recover the possession of the Kirtley lode mining claim, an undivided one-half of the Junction lode mining claim, and an undivided three-fourths of the Trade Dollar lode mining claim, and it was averred in the complaint that the action was brought in support of an adverse claim filed against said defendant's applications for a patent for the Wash Lewis and Henry, lode mining claims. The defendant, answering the complaint, denied plaintiffs' title to said mining claims, admitted that the action was brought in support of an adverse claim as to so much of the Kirtley claim as is covered by the Wash Lewis claim, but denied that it was brought in support of

¹ *Mattingly v. Lewisohn*, 19 Pac. 310; *Steves v. Carson*, 16 M. R. 14; *Hunt v. Eureka Gulch Co.*, 14 Colo. 451.

an adverse claim as to the remaining portion of the Kirtley claim, and, as to the Junction and Trade Dollar claims, alleged that plaintiffs failed to bring any adverse claims in support of their title, or pretended title, to said Junction and Trade Dollar mining claims within the sixty days during which defendant's applications for a patent for the Wash Lewis mining claim, and for a patent for the Henry mining claim, were published, and that by such failure plaintiffs were barred from asserting title to either the Junction or Trade Dollar claims, so far as said claims conflicted with or were covered by either the said Wash Lewis or the said Henry claim; alleged that defendant claimed the right to occupy and possess all that part of the Junction and Trade Dollar claims lying within the exterior lines of the Wash Lewis and Henry, by pre-emption, discovery, and location, as parcels of said Wash Lewis and Henry claims, and also by reason of the failure of the plaintiffs to file adverse claims in favor of said Junction and Trade Dollar claims against said Wash Lewis and Henry claims.

Plaintiffs' demurrer to so much of defendant's answer as alleged a failure to adverse the Wash Lewis and Henry claims, based upon the grounds that, if said allegations were true, the facts would be no bar to the action, and that a failure to adverse is no bar to bringing an action to try title to claims for which no entry has been made, was sustained.

By a supplemental complaint the plaintiffs seek to recover possession of the west 1,426 feet of the Steam-Boat lode mining claim. A motion to strike out this supplemental complaint was denied. Defendant's answer to said supplemental complaint puts in issue all the material allegations thereof, and alleges that the land claimed or covered by the said Steam-Boat claim is covered by patents issued to defendant by the United States, for the No. 8, No. 10, and O. K. lode mining claims, and by applications by defendant for patent for the Wash Lewis and Henry claims, and that no adverse claim was filed on behalf of said Steam-Boat claim against said applications for patent by defendant within the period allowed by law for filing adverse claims, and that defendant is the owner of said patented claims, and is

the owner of, and has the right to occupy and possess, said unpatented claims. A demurrer to so much of the answer to the supplemental complaint as relates to the applications for patents for the Wash Lewis and Henry claims, on the ground that the allegations thereof are not sufficient to constitute a defense, was sustained. The Colorado Central Consolidated Mining Company was made co-defendant on its petition. The jury, by their verdict, found that plaintiffs were entitled to the premises in conflict between the Kirtley and Henry lodes, between the Kirtley and Wash Lewis lodes, between the Trade Dollar and Henry lodes, and between the Junction and Henry lodes, and as to the Steam-Boat and No. 10 lodes they found that plaintiffs were the owners of a certain portion of the Steam-Boat lode, and were entitled to the possession thereof, excepting the grounds embraced within the lines of the O. K. lode. The judgment entered on the verdict is for the recovery of the premises therein described, excluding so much thereof as are embraced within the side and end lines of the No. 7, No. 8, No. 10, and O. K. patents.

MORRISON & FILLIUS, for appellants.

L. C. ROCKWELL, for appellees.

RISING, C. (after stating the facts as above).

The ruling of the court upon the plaintiffs' demurrer to the defense, set up in the answers, based upon the failure to adverse the Wash Lewis and Henry claims with the Junction and Trade Dollar claims, is assigned for error. In considering the question presented by this assignment it is proper to first examine the pleadings for the purpose of ascertaining the object of the action. The complaint contains the proper allegations for an action brought to recover the possession of the Kirtley lode, the undivided one-half of the Junction lode, and the undivided three-fourths of the Trade Dollar lode, and also contains the further allegation that the action is brought in support of an adverse claim filed against the applications for patent for the Wash Lewis and Henry lodes. It is contended by counsel for defendant in error

that the last allegation tenders an immaterial issue, and that the sole object of the action is to recover the possession of the premises described in the complaint, and that its determination does not in any manner depend upon, and can not be affected by the filing, or by the failure to file, adverse claims against the applications for patents to the Wash Lewis and Henry lodes; while counsel for plaintiff in error contend that the object of the action is to have adverse claims against the issuance of patents to the Wash Lewis and Henry lodes determined. Section 2325, Rev. St. U. S., prescribes the necessary steps to be taken by an applicant to obtain a patent for mineral land, and declares: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Section 2326 declares: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

By these provisions of the statute the filing of an adverse claim is made the first step to be taken in proceedings for determining the right of possession and title under a valid location, for the purpose of establishing the right to a patent, and upon taking this step the issuance of a

patent is stayed until such right has been determined or has been waived by the party filing such adverse claim. That a party who commences an action under the statute, to determine such right of possession, must stand or fall by the rights which he has asserted in his adverse claim, seems evident from the requirement of the statute that the nature, boundaries, and extent of such adverse claim must be shown by the adverse claim filed. The issuance of a patent to the applicant can not be stayed by reason of some one else claiming a better right to the possession of the premises, unless the person making such claim files the same against the claim made by the applicant. An action brought in support of such adverse claim must be based upon the rights asserted in such claim, for the reason that it must be conclusively assumed that no adverse claim exists except such as have been filed. The allegation in the complaint that the action is brought in support of adverse claims must be held as determining the character and object of the action, and such object is to establish plaintiffs' right to the possession of the premises in controversy, by reason of a valid location thereof under the acts of Congress, under the adverse claims in support of which the action is brought, and to stay defendant's proceedings under the application for a patent thereto until the right of the plaintiff under said adverse claims may be adjudicated: *Wolfley v. Lebanon Co.*, 4 Colo. 112, 117; *Wight v. Dubois*, 21 Fed. Rep. 693. In *Eureka Co. v. Richmond Co.*, 4 Saw. 302, 318, it is said by Justice Field that, under the act of 1872, "when one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections, and present them, or he will afterward be precluded from objecting to the issue of the patent." The object of an action, brought in support of adverse claims, being to determine the plaintiff's right of possession and title under such claims, it becomes a material question in the case whether the requirements of the statute in relation to the filing of such claims have been complied with, as the very basis of the action is the filing of

such adverse claims in the land office; and when it is alleged in defendant's answer that his right to a patent was not adversely by a claim under which plaintiff claims the right of possession to the premises in controversy, such answer presents a defense as against such claim. It follows, therefore, that the court erred in sustaining the demurrer to the defense alleging a failure to adverse the Wash Lewis and Henry claims with the Junction and Trade Dollar claims.

Appellants, in instruction No. 4, requested the court to instruct the jury that the plaintiffs were confined to such title to the premises in controversy as they had at the time the action was commenced, and the refusal to give such instruction is assigned for error. We know of no reason why an adverse claimant, who has brought an action in support of his adverse claim, may not be permitted by the court to bring in other adverse claims by a supplemental complaint, if the same have been duly filed, and are so brought within the time limited for the commencement of an action in support thereof, although he may have acquired the right to the possession of such claims by purchase, after the commencement of the action. As such purchaser he could bring an independent action in support of the adverse claim filed, and if brought in the same court where the first action was pending, the court might order the cases consolidated. We see no objection to the bringing in of such adverse claims by supplemental pleadings. The instruction was properly refused.

It is contended by counsel for appellants that the failure of an adverse claimant to bring an action in support of his adverse claim within thirty days after filing such claim is a waiver thereof, and that the application of this rule takes the Junction out of the case, it being shown by the evidence that the action was brought on the thirty-first day after the filing of an adverse claim under the Junction location; but appellee contends that this question can not be raised for the first time in the case in this court. We think this point made by counsel for appellee is well taken. Error is assigned upon the giving of each of the instructions requested by the plaintiffs, but in the argument of counsel no objection to these instructions is urged except to certain portions of

instruction No. 1, and as to such portions it is contended, as to some parts thereof, that the burden of proof is thereby placed on the defendants, when it should properly be made to rest on the plaintiffs, and that, by another portion of said instruction, the jury were authorized to find against the defendants for the entire area of the premises in conflict with each of the adverse claims relied on by the plaintiffs, upon a showing by plaintiffs of a better title under either of such claims.

We do not think these objections to the instructions are well taken. Under the holding that the object of the action is to establish plaintiffs' right of possession under the adverse claims in support of which it was brought, by reason of a location thereof, in compliance with the provisions of the statute relating to the location of mining claims, the consideration of many of the assignments of error is made unnecessary, for the reason that the questions raised thereby are substantially the same as the question determined, or are such as will by such holding be eliminated from the case on a new trial. The judgment should be reversed.

DE FRANCE and STALLCUP, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment is *reversed*.

STEVES ET AL. V. CARSON ET AL.

(42 Federal, 821. In the Circuit Court of the United States, District of Colorado, 1890.)

Suit supporting adverse claim must be brought within the thirty days, and prosecuted with reasonable diligence—and there is no saving clause for accidents or disabilities.

When such suit has been brought but dismissed, another action can not, after the statutory period, be brought and maintained under the Colorado statute providing against the running of the statute of limitations in certain cases where a former suit has abated.

At law. On demurrer to complaint.

WILSON & STIMSON, for plaintiffs.

PORTER PLUMB, for defendants.

Before CALDWELL and HALLETT, JJ.

HALLETT, J.

March 6, 1889, defendants applied in the land office at Glenwood Springs to enter the Blazing Star lode claim in Pitkin County, to a portion of which plaintiffs made adverse claim May 10, 1889, under a location called the "Jay Gould Lode." This suit was brought in support of the adverse claim, April 29, 1890, nearly one year after filing the adverse claim in the land office. The act of Congress (Rev. St. § 2326) plainly requires the adverse claimant "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession," and this suit was not brought within that time. Plaintiffs aver, by way of excuse for the delay, that a suit in all respects similar to this was brought by them, in due time, in the District Court of Pitkin County, which was afterward dismissed by the court "for a matter of form," in that no summons was issued within one month after filing the complaint; and plaintiffs rely on a section of the statute of limitations of the State (section 18, p. 673, Gen. St. 1883) which provides that, in case of the failure of a suit from insufficient service, unavoidable accident, and the like, plaintiffs may renew their suit "at any time within one year after the abatement or other determination of the original suit."

This proposal to ingraft a statute of the State upon an act of Congress does not appear to be within any recognized principle of construction. It is true that State statutes of limitation are often enforced in Federal courts, when, like other laws of the State, they enter into the contract, and become binding on the parties. But they have no application in a proceeding for disposing of public land, of which Congress has exclusive jurisdiction. In respect to the manner of making locations, it is provided in the act of Congress that

it may be supplemented by local law, and the rules and customs of miners. But where there is a proceeding in the land office, and a controversy in that office, suits in court to settle the title, are to be begun and conducted as declared in the act of Congress, which must be regarded as full and complete on that subject. There were obvious reasons for requiring that the application for title, when made in the land office, should be carried to a speedy determination. In the case of agricultural lands, controversies as to the ownership were settled in the land office. But this practice was always unsatisfactory; and so, in the act now under consideration, it was provided that, in case of adverse claimants to the same tract of mineral land, the parties shall go into a court of competent jurisdiction, where, from the orderly course of established justice, better results may be expected. Promptness and diligence in such matters are of the greatest importance to all concerned; and therefore it was provided that the adverse claimant in the land office must begin suit to settle the title within thirty days from the time of filing his adverse claim, and he must prosecute the suit with reasonable diligence. There is no exception as to the claimant who may be beyond seas, or under disability of any kind, or who may fail to act from inadvertence or other cause. The suit must be brought within the time specified, and it must be prosecuted with reasonable diligence. The act says: "And a failure so to do shall be a waiver of his adverse claim." This act admits of no addition or modification from the statute of the State; and where, as in this instance, the claimant commences suit in due time, and is cast in his suit, he is without remedy, except such as may be obtained in the same suit on appeal or writ of error. *The demurrer will be sustained, and judgment of dismissal will be entered.*

CALDWELL, J., concurs.

1. Proceedings in support of, are at law and not in equity. *Burke v. McDonald*, 13 Pac. 351; *Manning v. Strehlow*, 18 Pac. 625. The issue is the right of possession—immaterial as to which party is in possession. *Burke v. McDonald*, 13 Pac. 351. That it is an equity proceeding was held in *Doe v. Waterloo Co.* 43 Fed. 219.

2. Conspiracy between hostile co-owners to abandon and relocate, not available in a suit supporting adverse. *Doherty v. Morris*, 16 Pac. 911.

3. Verdict in, form of— not sufficient to show right of possession. *Manning v. Strehlow*, 18 Pac. 625.
4. Complaint must show adverse filed and suit brought within the statutory period. *Mattingly v. Lewisohn*, 19 Pac. 810.
5. Owner of title held in trust by applicant need not adverse. *Hunt v. Patchin*, 35 Fed. 818.
6. A tunnel may adverse. *Back v. Sierra Nev. Co.* 17 Pac. 88.
7. Court of equity will protect co-tenant. *Tabor v. Sullivan*, 20 Pac. 442; *Sawyer v. Turner*, 16 M. R. —.
8. In suit supporting, citizenship should be averred. *Keeler v. Truman*, 15 Colo. 143. It is not necessary in ordinary civil cases concerning mines. *McFeters v. Pierson*, Id. 201.
9. The court, not the land office, must determine what is diligence in prosecuting an adverse claim. *Rose v. Richmond Co.* 27 Pac. 1105.
10. A patent issued pending an adverse claim is void. *Id*
11. Failure to file adverse or allowing the supporting suit to be dismissed is a bar to all asserted rights. *Kannaugh v. Quartette Co.* 27 Pac. 245.
12. Defendant's answer must set forth title and show his right as against the government as well as against plaintiff. *Anthony v. Jillson*, 16 M. R. 26.
13. An allegation in the pleadings of full compliance with the laws and statutes of the United States, etc., held, a mere conclusion of law. *Id.*
14. Objections to its sufficiency must be made in the land office and not in the ejectment suit. *Rose v. Richmond Co.* 27 Pac. 1105.
15. Where plaintiff and defendant are in possession of different parts of the same lode, plaintiff can maintain suit supporting adverse to the entire lode. *Id.*
16. Where a claimant adversely, he is not bound to protest against a second application by the same party under a different name to the same premises. And a patent on the second application is void. *Id.*
17. In suit supporting, each party must prove title. *Bay State Co. v. Brown*, 21 Fed. 167.
18. Since neither party is entitled to judgment unless his title is established, an instruction that if the evidence be equally balanced defendant is entitled to recover, is erroneous. *Becker v. Pugh*, 29 Pac. 178.

LOCKHART ET AL. V. ROLLINS.

(21 Pac. Rep. 413. Supreme Court of Idaho, 1889.)

Tacit consent amounts to agreement. Where a bill of exceptions is signed some time after trial, under a statute requiring it, when so delayed to be by "agreement of the parties,"—with the knowledge and in presence of the attorneys and with their tacit consent, such circumstances amount to an agreement under the act.

¹ **Custom of miners as to transfer of title prior to the original Congressional Mining Act of 1866,** may be established by parol proof, and a parol sale followed by change of possession under such custom will be upheld.

Care of Agent counted as annual labor. Where a mine is idle, time and labor of a watchman and custodian employed to take care of the works is labor done on the claim.

Labor contracted for and performed will count as the annual expenditure though not yet paid for.

No relocation before abandonment. A party can not make a valid relocation of lands legally possessed by another until the owner's rights have been abandoned, forfeited, or otherwise ended.

² **Fiducial relation of local agent to the principal.** The undertaking by one on the ground to procure a purchaser for a mining claim, the owners being non-residents of the territory, and having no other agent in the territory to look after the claim, constitutes a fiduciary relation in such person to such property.

Such agent can not relocate. A person sustaining such fiduciary relation in respect to a mining claim can not defeat the rights of his principal by relocating it for himself.

If he do so relocate it, and benefit accrues from such act, the benefit accrues to the owner, and not to the relocater.

Appeal from District Court, Alturas County.

This action is for the recovery of possession of a certain mining claim situate on Bear Creek, Alturas County, Idaho, known as the "Ada Elmore Lode and Mining Claim." The complaint alleges that the plaintiffs have a "legal right to occupy and possess" the claim by virtue of compliance with all the requirements of law and rules of miners, and of act-

¹ *Sullivan v. Hense*, 9 M. R. 487.

² *Fuller v. Harris*, 29 Fed. 814.

ual prior occupancy of it as a mining claim; also that the defendant, on the 4th day of January, 1886, while in the employ of the plaintiffs as their agent, and as such agent in the actual occupancy of said property, made a relocation of the property adverse to the rights of the plaintiffs, intending the same to be for his benefit; that the defendant ever since such act wrongfully withheld possession from the plaintiffs, to their damage, etc.; and prays judgment for the possession of the premises, with damages for detention; and closes with a general prayer for relief. The answer is a general denial, but avers, among other things, that "the said alleged original locations on said Ada Elmore lode," consisted of several mining claims located thereon, by the discoverers thereof, in 1863, extending 1,200 feet in length, along said lode, and no more, "with a width of 100 feet; that prior to the 19th day of June, 1878, said Pittsburgh and Idaho Gold Mining Company had or claimed an interest in, or right of possession of 700 feet undivided of said 1,200 feet of said premises; that on that day the plaintiff, Charles Lockhart, as assignee of one Newton, a judgment creditor of said company, and purchaser of said interest of said company, under a sheriff's sale thereof, succeeded, by sheriff's deed, to whatever interest," etc., said company had in said premises; that thereafter, and until the defendant's discharge, in August, 1885, the defendant acted as agent for said Lockhart, in the care and supervision of said mining claim and business and improvements connected therewith; that in 1883 the plaintiff, Lockhart, contracted with defendant to pay defendant for his services as such agent \$500 a year, beginning January 1, 1883, in consideration of which the defendant "agreed to take and keep the care and supervision of said property, business and improvements; prevent waste thereon; preserve the possession thereof; attend to the payment of taxes and hire of laborers to perform the requisite annual labor, to be paid out of funds to be furnished by the said Lockhart." Alleges performance of such duties until his discharge, in August, 1885. Alleges payment of such salary for 1883 and 1884, and claims such salary as unpaid for 1885, up to July 31st of that year; and alleges that the assessment work for 1885 was not done, whereby, and

"by force of the law," the claim "became forfeited and relegated to the body of public mineral lands;" and on the 4th day of January, 1886, he "located a claim as the 'Ada Elmore,' including said premises, of 1,200 feet long and 100 feet wide, enlarging the location to 1,500 feet in length by 600 feet in width; claiming such relocation for his benefit—and closing with prayer for judgment against said plaintiffs for the right of possession of his said Ada Elmore lode, and for costs, and that the judgment "be certified to the register of the land office," etc.

The case was tried by the court without a jury, at the October term, 1887. Findings were filed December 10, 1887, and judgment for plaintiffs on such findings of fact and law was entered on that day. The findings and judgment affirm the right of the plaintiffs to all the lands described in the defendant's location of January 4, 1886.

This part of the judgment is based mainly on the following findings of fact and conclusions of law: "The court finds as a fact that on the 4th day of January, 1886, a fiduciary relation existed between the plaintiffs and defendant, by reason of the employment of the defendant to procure for the plaintiffs a purchaser for the property included in the defendant's location of January 4, 1886, for a percentage of the proceeds of such sale as his commission;" and as conclusion of law that the defendant, sustaining such fiduciary relation in respect to this property, acquired no rights by his relocation—the lands so affected by this finding extending beyond the original claim in length 250 feet, and on each side 250 feet, the point of location at which defendant placed his notice being at the plaintiffs' shaft on the Ada Elmore lode claim. As to whether this finding of fact is sustained by the evidence, it was further found that, during the year 1885, the annual labor required by law (Rev. St. U. S. § 2324) was performed by plaintiffs on said Ada Elmore lode claim by caring for and maintaining the buildings and improvements thereon; and hence that the claim was not on the 4th day of January, 1886, subject to relocation. We shall consider these findings hereafter.

J. B. ROSBOROUGH, for appellant.

LYTTLETON PRICE and R. Z. JOHNSON, for respondents.

BERRY, J. (after stating the facts as above).

A question of practice and of evidence is presented at the beginning of the consideration of this case. It appears that the findings of the court below were filed December 10, 1887, and judgment for the respondent was entered on that day; that a case was soon thereafter prepared, including assignments of error, presented for settlement, and settled and allowed, on the 28th day of January, 1888. The certificate of the judge states that such case, with assignments of error included, were "examined, settled and allowed in the presence of the attorneys of the respective parties." Both parties participated in the settlement, without objection. The respondent now claims that many of the alleged errors, if errors at all, were committed in the course of the trial, and the exceptions under Rev. St., § 4426, should have been settled at the time the decision was made, and not having been settled for nearly two months after the trial, must be deemed as waived. The statute declares that such "exceptions must be taken and settled at the time the decision is made, and no order of the court shall be made for the settlement of such exceptions at any other time, except by the agreement of both parties." The action of the court in actually settling these exceptions on the 28th of January is equivalent to an extension of the time to that day. Both parties were present at such act, and took part in the proceedings, apparently without objection. Such tacit consent is equivalent to an "agreement of both parties." The settlement of the exceptions was therefore regular.

The next question raised is as to the admissibility of the evidence of the local customs of miners in transferring interests or rights of possession in mining claims prior to July 26, 1866. The original locators of the Ada Elmore lode mining claim were six in number, and the witness Sawyer was one of them. In showing a transfer of the several interests of some of the several locators to the plaintiffs, the witness Sawyer was asked:

"*Question.* What were the customs as to the transfer of

mining property in that district from 1863 to 1866, till the passage of the law of Congress that year?" (Objection was made by appellant to the question and to proof of custom as irrelevant; that the evidence of such transfers should be in writing. The objection was overruled, and the witness answered.) "*Answer.* I know the custom. It was by bill of sale or word of mouth. Either was good from 1863 to 1866 to a friend. To those unknown it was otherwise. We had no lawyers to write deeds. When a sale was made to a friend, he would just step into possession."

It was not error to allow this evidence. The act of Congress of July 26, 1866, clearly indicates that the rights of mining claimants may be subject "to the local customs or rules of miners," they not being in conflict with the laws of the United States. It even allows those laws, customs, and rules of miners in establishing the right of a claimant to enter and receive a patent to a mining claim: *Tunnel Co. v. Stranahan*, 20 Cal. 198; *Mining Co. v. Taylor*, 100 U. S. 37. The new location of the plaintiffs' claim is admitted in the answer; that prior to June 19, 1878, the Pittsburgh & Idaho Mining Company, one of the plaintiffs, had or claimed an interest of 700 feet of the 1,200 feet of the Ada Elmore claim, and that the plaintiff Lockhart became the owner of it through a sheriff's deed, in an action against this company. Conveyances to said company were shown, covering the balance of said claim; also that plaintiffs had been in peaceful and exclusive possession of the claim, with claim of right, working or improving it, for nearly twenty years. There was other evidence tending to show that the plaintiffs were rightfully in possession of this property. On this point their claim of rightful possession was fully established. The finding of the court below on this point must be sustained.

But it is contended that the labor required by law was not performed in 1885, and that for that reason the claim in question was, at the beginning of 1886, open to relocation adversely to plaintiffs. By Section 2324 of the United States Revised Statutes, the holder of a mining claim, to maintain his right of possession, must see that "one hundred dollars' worth of labor shall be performed on such claim, or in im-

provements made thereon, during each year." The object of this requirement seems to be that the holder of a mining claim shall give substantial guaranty of his good faith. It can not be from any desire on the part of the government to obtain the money of the locator. His right of possession does not depend upon any money consideration, but it is a right founded in public policy. It would be clearly against public policy for one to take and hold a mining claim for years, against all others who would be locators, merely that he might speculate upon it, with perhaps no design to develop it. Some guaranty of his good faith is required, as a condition of allowing him such exclusive possession. The labor is not required to be applied in any particular manner, but so that it is unquestionably devoted to such claim: *McGarritty v. Byington*, 12 Cal. 426. It must not be so as to raise a question as to its purpose. The exception made in the statute itself invites this construction. It is conceded that this labor may be in digging, erection of works for mining, in placing machinery, or in buildings on the claim, necessary for its working. In the case at bar the labor of the defendant, under hire of the plaintiffs, at the salary of \$500 a year, continuing at that rate to the 31st day of July, 1885, was in its character precisely what it had been for the two preceding years. His time was spent upon the property in caring for it, and in protecting it from deterioration, loss, or danger. It involved daily visitations in and over it, and into the works; in fact, as the defendant himself testified, "in doing all that could be done with idle property." The exigencies of the mining business frequently require property of this kind to remain idle for a time, but that is not necessarily evidence of intent to abandon it. In this case, at least, the acts of the plaintiff show that such was not their intention. The improvements to be taken care of and protected were valuable, and consisted of buildings, engine, boiler and machinery, hoisting works, etc.; and, from the defendant's evidence, presumably costing thousands of dollars. They had been constructed and used in the development of this mine. The plaintiffs, with them, had worked the mine for years, and when they needed repairs had repaired them. The hoisting works had to be rebuilt, while

the defendant was in charge of the property, at a cost of \$2,300. All that was done by the defendant for the plaintiffs in 1885 was clearly in pursuance of their former well-established purpose.

The question as to what shall be understood as "labor upon mines," buildings, etc., has been much discussed, in cases of mining claims; more frequently, perhaps, in cases of liens for labor done. The cases have mostly arisen under claims for miners' or mechanics' liens. While the words of the various statutes are not always identical, there is a general uniformity in the words used in these laws with the statute requiring this annual labor upon mining claims. Practically, where the claim is for work done, the statutes require it to be done on the property. The case of *Mining Co. v. Bouscher* (Colo.), 12 Pac. Rep. 433, decides what shall constitute labor done "in or upon" mining claims, under the lien law of that State. The law (Section 1655, Gen. Laws Colo.) reads: "All miners, laborers and others, who work or labor in or upon any mine," etc., "shall have a lien," etc. The court holds that services of a superintendent of mines, in planning or superintending the erection of a mill and machinery, are work or labor, in or upon the property, within the meaning of the statute. So in Utah (Comp. Laws, § 1221) one who shall do work "upon any mine shall be entitled," etc. In a case founded upon this statute (*Mining Co. v. Cullins*, 104 U. S. 176), the court say: "It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien and that which is merely professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of Utah, that an architect who furnishes plans, and superintends the erection of a building, acquires a lien thereon for work and labor;" and cite *Stryker v. Cassidy*, 76 N. Y. 50; *Insurance Co. v. Rowand*, 26 N. J. Eq. 389; and other cases. In that case the claimant of the lien was an overseer and foreman of a body of miners, and his claim was held good. If it be said that these cases go rather to what shall be deemed work, we answer that is precisely the case at bar. There can be no question that whatever was done was done on the plaintiff's claim. So in Oregon, under Section 1, C. 32, Laws Or., under a like

statute, the court in *Falls Co. v. Remick*, 1 Or. 170, give a like construction.

All the authorities cited by the appellant on this point are consistent with the same view. The strongest case cited for the appellant is that of *Du Prat v. James*, 65 Cal. 555; 4 Pac. 562. A party had leased a mill, located about a quarter of a mile from his claim, but whether for the sole purpose of developing his claim does not appear. He made efforts, at first unsuccessful, to get water from a ditch to operate the mill, and traveled to distant places to see agents of a ditch company, to get water for, as he claimed, the same purpose, and incurred expenses in time and money in doing so. Having succeeded, however, in getting water, "he did not use it, or attempt to crush rock or ore." None of these acts were done on the claim, nor were they necessarily connected with this mine. Indeed, his failure to use the water after he had obtained it raises a strong presumption that he did not intend to do so; at least, not to develop this mine. The court, properly as we think, held this expenditure was not on the mine, in the sense intended. The case cited (4 Pac. Rep. 562) is the same as that last commented upon. The case of *McGarrity v. Byington*, 12 Cal. 426, by implication, at least, favors the view we take upon this subject. It holds that "work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it;" clearly implying that, when its purpose is self-evident, it is within the statutes by intendment, if not literally. The personal services of this agent were work and labor. They were performed on the property. They were in aid of the development of this claim. They tended as directly as acts can tend to show the good faith of the plaintiffs, and their purpose not to abandon the mine; at least up to the time they had expended in its preservation (in 1885), labor to the value of \$333.

But it is contended that the plaintiffs have not yet paid for this labor. That does not affect the fact that the labor was done by their procurement. The defendant did it for hire, and may recover for the services under his contract. We conclude that on the 4th day of January, 1886, the Ada

Elmore lode mining claim was not open to relocation adversely to the plaintiffs. See *Morgan v. Tillotson*, 15 Pac. Rep. 88.

But the court below goes further, and holds that the relocation made by the defendant inures to the benefit of the plaintiffs. Under the pleadings such relief can be had. The conclusion is based upon a finding of fact that, at the time of relocation, the defendant sustained a fiduciary relation to the plaintiffs respecting this property. From the evidence it appears that one W. N. Frew, of Pittsburgh, Pa., where the plaintiffs resided, and still reside, for about eight years next prior to the beginning of this action acted as agent of the plaintiffs, and as such had been known to and dealt with by the defendant. It was through Frew that defendant was in plaintiffs' employ about the premises from 1883 to July 31, 1885. There was much and constant correspondence between the defendant and Frew; and on the termination of the defendant's services in caring for the property, July 31, 1885, through Frew, defendant was tendered the further service of finding a purchaser for the property at such sum as the plaintiffs would be willing to take, he to receive a percentage of the proceeds for his commission on completion of the sale. The defendant undertook to procure such purchaser, but none had been found up to the beginning of 1886. From this the court held the relations of the defendant with the plaintiffs, with reference to this property, were so far of a fiduciary nature that he would not be permitted to relocate the subject of his trust, for his own benefit; that what he did by the way of enlarging the boundaries of the claim was done for the benefit of his principals, subject to their right of election to accept the same. We think the court below was correct in so holding. Numerous authorities are cited by the respondent in support of this decision, but the principle is too well settled to admit of controversy, and we omit citations. The order denying a new trial is sustained, and the judgment is affirmed.

WEIR, C. J. and LOGAN, J., concur.

1. Bringing suit by principal to secure his title is a ratification of agent's act in locating for him. *Thompson v. Spray*, 14 Pac. 182.
2. Sufficient proof of agent's power to approve contract and accept mill. *Starr v. Gregory Co.*, 13 Pac. 195.
3. Entitled to pay for services without special contract. *Martin v. Roberts*, 36 Fed. 217. And to reasonable pay where a contingent expectation is cut off by termination of the agency. *Id.*
4. Courts will not enforce a contract between agent and third party with intent to defraud principal. *Jacobs v. George*, 11 Pac. 110.
5. Ratification of agent's act may be proved without pleading it. *Hoosac M. Co. v. Donat*, 16 Pac. 157; 10 Colo. 529. And is presumed from failure to disaffirm. *Id.*
6. Agent allowed to draw draft under general power of attorney. *Withington v. Herring*, 5 Bing. 442.
7. Contract for salary and expenses construed. *French v. Brookes*, 6 Bing. 854.
8. A general agent of a mining company has power to sell its personal property. *Scudder v. Anderson*, 19 N. W. 775.
9. An agent having authority to sell and to receive for himself everything above a certain price may himself become a purchaser, and is not under obligation to disclose to his principal increased value discovered since the arrangement was made. *Synnott v. Shaughnessy*, 7 Pac. 82.
10. Where the powers of an agent are disputed and depend upon contested facts, the question of agency is for the jury. *Gano v. Chicago Ry.*, 49 Wis. 57.
11. An agent by letter was authorized to confer "and if possible come to some amicable arrangement." The settlement can not be repudiated on the ground of secret instructions limiting the terms of compromise. *Trickett v. Tomlinson*, 13 Com. B. N. S. 663.
12. Overdrawn bank account of superintendent recovered on. *Alderson v. Crocker*, 28 Fed. 745.
13. Bank can not offset agent's private account against the overdraft of his company made by him. *Miller v. Mickel*, 15 M. R. 355.
14. Agent, when personally liable in tort. *Berghoff v. McDonald*, 87 Ind. 549.
15. A and B sold adjoining claims at \$10 a foot, A representing that the purchaser was paying that price for them; but, in fact, he paid to A \$20 a foot. Held, that A was not the agent of B and that B could not recover. *Thorne v. Bowers*, 25 Pac. 476.
16. The general manager has power to contract to sell all the ore to a smelting company within a given period. *Robert E. Lee Co. v. Omaha Co.*, 26 Pac. 326.
17. The general manager of a mining company has no authority by virtue of his office to bind the company by contracts for purchase of machinery. *Victoria M. Co. v. Fraser*, 29 Pac. 667.

BASCON ANTHONY ET AL., Appellants, v. EMMETT JILLSON ET AL., Respondents.

(83 California, 296; 23 Pac. 419. Supreme Court, 1890.)

An alien can not make a valid location.

¹**Declaration of intention not retroactive.** Where an alien made his declaration of intention to become a citizen the day after the date of the location, this did not operate to validate the claim.

Where a record is not required by statute nor by district rule, the making of one is of avail for no purpose.

Failure to mark its boundaries is fatal to the attempted location of a mining claim, although the location be of a governmental subdivision.

²**In an action supporting an adverse claim, each party is an actor, and must state and prove not only his case against his adversary but facts showing him entitled to a patent from the United States.**

A finding of five years' actual possession claimed to amount to title under the limitation clause of the mining act (Sec. 2332), held for naught for variance under the California practice.

Where a finding contains three specific statements of fact, a specification of error, designating it by numbers simply, as not sustained by the evidence, is insufficient.

Averment of "compliance with the law," a legal conclusion. An allegation, in a specification of error, that an alleged locator had "fully complied with the laws and statutes of the United States, with reference to the location of placer mining claims," states a mere legal proposition, and points to no finding of fact.

In bank. Commissioner's decision.

Appeal from Superior Court, Calaveras County. C. V. GOTCHALK, Judge.

W. K. BOUCHER and REDICK & SOLINSKY (P. REDDY, of counsel), for appellants.

IRA HILL REED and J. WARREN REED, for respondents.

HAYNE, C.

¹ *Herron v. N. Pac. R. Co.*, 14 Land Dec. 664. Otherwise when adverse rights have not intervened. *In re Edens*, 7 Id. 229.

² *Becker v. Pugh*, 29 Pac. 173.

This was an action to determine the right to a patent to certain placer mining ground. The defendants applied for a patent to a tract of 36.17 acres, called the "Rough Diamond Mine." The plaintiffs claimed a tract of 30 acres which overlapped a corner of the defendants' claim to the extent of 7.44 acres. This latter piece is the one in controversy. An adverse claim was filed by the plaintiffs, and thereupon such proceedings were had that the present action was brought under Section 2326 of the Revised Statutes, to determine the validity of the respective claims. The trial court gave judgment for the defendants, and the plaintiffs appeal.

1. The plaintiffs' mine is made up of two claims—one of 20 acres, alleged to have been located by Severino Gobbi, in 1878; and the other of 10 acres, alleged to have been located by the plaintiff Frank Anthony in 1885.

In relation to the Gobbi claim, the court found as follows: "That on December 6, 1878, one Severino Gobbi, a foreigner, sought to locate a placer mining claim by posting on the premises a notice, claiming, in his own name, twenty acres of ground situated in Chili Gulch mining district, in said county and State; said notice containing no description of boundaries other than giving the legal subdivision thereof, viz., being the N. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Section 25, Township 5 N., R. 11, E. M. D. M. That on the next day thereafter, viz., December 7, 1878, he declared his intention of citizenship, and caused a copy of his notice of location to be recorded in the county mining records of said Calaveras County; but whether such notice was recorded before or after making such declaration of intention does not appear."

The evidence justifies the finding. It shows that Gobbi did not file his declaration of intention to become a citizen until the day after he posted his notice of location; and it does not show that he did anything else after his declaration of intention, except, perhaps, to record his notice of location. The appellants assert in their specification that "there were no local rules or laws in force," and their counsel maintain in their brief that there were none. Certainly, there is no evidence of any local rules of any particular tenor; none requiring notices to be recorded, for example. Therefore,

recording the notice was not required (*Thompson v. Spray*, 72 Cal. 528; 14 Pac. Rep. 182; *Souter v. Maguire*, 78 Cal. 544; 21 Pac. Rep. 183); and not being required, it was useless. Leaving the record out of consideration, we see nothing that Gobbi did to effect a location except the posting of his notice, and at the time he posted his notice he was not a citizen, and had not declared his intention to become such. Under these circumstances, we do not think he acquired any right: Rev. St. U. S., § 2319;¹ *Lee Doon v. Tesh*, 68 Cal. 43; 6 Pac. Rep. 97; 8 Pac. Rep. 621. There is another reason why he acquired no right. The court finds "that said Gobbi did not mark out on the ground the boundaries of such attempted location, nor did he set any stakes or marks defining the limits of said claim." There is no specification attacking this finding; and, if there had been, we see no evidence against it. The failure to mark the boundaries is fatal to the validity of the claim. *White v. Lee*, 78 Cal. 593; 21 Pac. Rep. 363.

In relation to the claim alleged to have been located by the plaintiff, Frank Anthony, the court finds that he "did not mark out upon the ground the limits of such claim by either stakes or monuments defining his boundaries." The only specification attacking this is as follows: "Finding 4 is contrary to the evidence in this, to wit, that the evidence shows that plaintiff, Frank Anthony, in locating the ground therein described, fully complied with the laws and statutes of the United States with reference to the location of placer mining claims, and that there were no local rules or laws in force." The finding designated as "4" contained three specific statements of fact; and, this being the case, the mere designation of it by number, as not sustained by the evidence, was not sufficient as a specification: *Eddelbuttel v. Durrell*, 55 Cal. 278, 279; *Parker v. Reay*, 76 Cal. 103; 18 Pac. Rep. 124. And the clause that the evidence showed that the locator had "fully complied with the laws and statutes of the United states with reference to the location of placer mining claims" amounted merely to a legal

¹ This section provides that all mineral deposits in public lands shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, etc.

proposition, and did not point to any finding of fact: *Moyes v. Griffith*, 35 Cal. 556; *Coveny v. Hale*, 49 Cal. 552; *Thorne v. Hammond*, 46 Cal. 534; *Doherty v. Mining Co.*, 50 Cal. 187. But, if it be assumed in favor of the appellants that the specification is sufficient, the result would be the same, because the evidence does not show that the locator marked any boundaries upon the ground. Neither of the plaintiffs' locations, therefore, were of any validity.

2. Did the defendant show any right to a patent to the piece in controversy? In this regard, it is to be remembered that each party is to establish his right against the government as well as against his adversary. As was said concerning the plaintiff in *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. Rep. 1110: "His location must be one which entitles him to possession against the United States, as well as against another claimant." And, if it appears that neither had acquired a right, judgment should be given against both: *Jackson v. Roby*, 109 U. S. 441; 3 Sup. Ct. Rep. 301. And we think that the pleading of each should set forth the facts upon which he relies. This is the rule in reference to the pleadings in actions to determine the right to purchase other kinds of public lands. In *Woods v. Satelle*, 46 Cal. 389, Rhodes, J., delivering the opinion, said: "The action is brought to determine which of the parties has the better right to make the purchase, and it becomes necessary for each party to state directly all the facts upon which he relies to show that his is the better right." So, in *Cadierque v. Duran*, 49 Cal. 356, the same learned Justice, speaking for the court, said: "Each must state in his pleadings all the facts upon which he relies as showing his right to become a purchaser, and the steps he has taken to avail himself of, and secure, his right to make the purchase." The rule applies to the answer as well as to the complaint: *Christman v. Brainard*, 51 Cal. 536; *Ramsey v. Flournoy*, 58 Cal. 260; *Dillon v. Saloude*, 68 Cal. 267; 9 Pac. 162; *Gilson v. Robinson*, 68 Cal. 539; 10 Pac. 193; *Garfield v. Wilson*, 74 Cal. 177, 178; 15 Pac. 620. And we think that it applies to actions to determine contests concerning the right to patents to mining land.

Upon this theory, it was held in *Lee Doon v. Tesh*, 68

Cal. 43, 6 Pac. 97, 8 Pac. 621, that the complaint in such an action must allege that the plaintiff was a citizen; and, as a matter of course, where the party claims under a location made by another, he must show that the location was properly made by a qualified person. The defendants' answer in this case fails to show any right in them to a patent to the tract in controversy. They claim under two locations—one known as the "Green & Guy Claim," and the other known as the "A. K. Smith & Co. Claim." The answer does not mention either, and does not show that either Green or Guy, or any one from whom they may have purchased, or Smith, was a citizen of the United States. There is nothing definite averred concerning either of the locations, unless what appears at folio 41 be considered such. The requirement that a certain amount of work be done each year is imperative: *Morgan v. Tillottson*, 73 Cal. 520; 15 Pac. 88; *Jackson v. Roby*, 109 U. S. 440; 3 Sup. Ct. Rep. 301; *Chambers v. Harrington*, 111 U. S. 353; 4 Sup. Ct. Rep. 428. But, beyond a general statement that a great deal of valuable work was done, nothing is averred. The evidence in relation to the claims is meager and unsatisfactory; but it is unnecessary to examine it in detail, because the matters above referred to are sufficient to dispose of the appeal. It is sufficient to say that, in our opinion, there are several particulars in which it clearly fails to make out a case of right in the defendants against the United States. In fact, hardly anything that was required is shown to have been done.

The defendants contend, however, that they were in possession of the ground for a sufficient time to entitle them to a patent without reference to any location; and they rely upon the following provisions of the Revised Statutes: "Sec. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State, * * * evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter." The appellants contend that the evidence does not show that the defendants or their predecessors

were in possession of the property for the period prescribed by the above provision; and the respondents reply that possession is found, and that there is no specification attacking the finding. But we do not think that there is any finding of possession of the tract in controversy. The finding is that, for five years prior to 1877, Green and Guy had been in possession and working a "hill claim of 1,080 feet in length on the channel under Tunnel ridge, between Chili gulch, on the west, and Old Woman's gulch, on the east," and that transfers of the possession were made through various persons to the defendants. Now, aside from any other objection, there is nothing to show that the "1,080 feet in length" was a part of the 7.44 acres in controversy. It is found that it was a part of the 36 acres surveyed for the defendants on their application for a patent. But that might well be so, and yet it not be a part of the smaller piece in controversy. There is nothing in the pleadings or the findings which throws light on this subject. If this piece of 1,080 feet be in fact a part of the tract in controversy, the record should make the fact appear. Similar observations apply to the A. K. Smith & Co. claim, of 600 feet.

But, if the possession were otherwise sufficient, the showing would still be defective, because it is not pleaded or found that the persons whose possession is relied on were citizens of the United States, or had declared their intention to become such. That class is the only one that can acquire mineral land from the government: Rev. St. U. S. § 2319; *Lee Doon v. Tesh*, *supra*. The section above quoted provides an additional mode of acquisition, but does not enlarge the class who can acquire. Upon the record before us, we think that none of the parties showed a right to a patent for the tract in controversy; and we therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

WE CONCUR: BELCHER, C. C., VANCLIFF, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the

cause remanded for a new trial, with leave to the parties to amend their pleadings, if so advised.

1. The naturalization of alien during trial, not retroactive to validate claim. *Wulff v. Manuel*, 23 Pac. 728.

2. Defendant admitted citizenship of plaintiff's grantor; he can not, on trial, claim non-suit on account of alienage: *Id.*

3. To claim forfeit by conveyance to an alien it must be specially pleaded. *Id.*

4. Citizenship must be averred in trespass on mining claim: *Bohannon v. Howe*, 17 Pac. 588. And in complaint supporting adverse claim. *Keeler v. Trueman*, 15 Colo. 143.

5. Insufficient proof of citizenship. *Wood v. Aspen Co.*, 86 Fed. 25.

6. Citizenship of resident is presumed. *Jantzen v. Arizona Co.*, 20 Pac. 93. The same of locator. *Garfield Co. v. Hammer*, 6 Mont. 58.

7. Where in trespass for unlawful entry on an unpatented claim the plaintiff makes no averment of citizenship, but there was no exception taken on this account, it will not be regarded on appeal. *Jackson v. Dines*, 21 Pac. 918.

8. Where a mining claim had been located by an alien, but a transfer had been made to a citizen for the purpose of procuring title, and such citizen had obtained receiver's receipt, and then conveyed to a domestic corporation in which the alien was principal stockholder: *Held*, that the title, though entered for patent by a citizen, was void as against a conflicting location by a citizen. *Lee v. Justice Mining Co.*, 29 Pac. 1020.

CHRISTINA DE NOON, Respondent, v. A. R. MORRISON ET AL., Appellants.

(88 California, 163; 28 Pac. 374. Supreme Court, 1890.)

¹The owner of two mining claims held in common has the right to do the annual work necessary for the protection of both claims on one of them; and the question whether the work was intended for the benefit of both claims, and tended to develop both of them, is one of fact, upon which the decision of the jury will not be disturbed, if there is any evidence tending to support the verdict.

Proof of title to the adjoining claim. Plaintiff owned the Gordon and the Morton claims. The title to the Gordon only was in dispute in this case, but all the work done to hold the two claims had been done on the Morton. Plaintiff proved title to the Gordon and her work on the Morton, but did not prove location of the Morton, or other title beyond possession and improvement. *Held*, that she was not required to prove title to such lode, as her possession and improvement was a presumption of ownership in a case where title to the Morton was not contested.

Point already covered. It is not error to refuse instructions prayed for where the same point has been already covered.

Department 1.

Appeal from Superior Court, Nevada County; J. M. WALLING, Judge.

THOMAS FORD, for appellants.

FRED SEARLS and CROSS & DENSON, for respondent.

FOX, J.

Action to recover the possession of the Gordon placer mine, in Nevada County. Trial by jury. Verdict and judgment for plaintiff. Motion for new trial made and denied, and defendants appeal from both the judgment and order.

One of the grounds of motion for a new trial was that the evidence was insufficient to justify the verdict. This point is incidentally discussed on the appeal, but it is difficult

¹ *Chambers v. Harrington*, 111 U. S. 350.

to determine whether appellants still rely upon that ground or not. We have, however, examined the evidence, and find that there is some evidence to support the verdict upon every issue of fact involved in the case. Under the well-established rule of this court, the verdict will not, therefore, be disturbed on that ground.

Defendants claim the mining ground under a relocation, authorized, as they claim, by a failure of plaintiff to do the required assessment work for the year 1888. No work was done within the lines of the Gordon claim in that year; but the plaintiff claimed to be the owner, and was in possession, of two or more adjoining mining claims, of which the Gordon was one. Of this claim she proved regular location and transfer to herself, and performance of the requisite assessment work down to and including the year 1887, and also that the \$500 of work necessary to procure a patent for the Gordon claim had been done prior to 1888. She also claimed to be the owner, and was in possession, of the Morton placer mining claim—a claim adjoining the Gordon on the east. In 1883, she expended \$306 in running a tunnel on the Morton claim in close proximity to the line of the Gordon. It was claimed that this tunnel was run for the benefit of both mines, and proved that it would tend to develop both. Defendants, however, claim that at the time the work was done, its purpose was to complete the work necessary to entitle the plaintiff to a patent of the Morton, and not for the benefit of the Gordon, in any sense. That is a question of fact submitted to the jury, and their verdict upon that question will not be disturbed. As a matter of law, the plaintiff had the right to do the work necessary for the protection of both claims on one of them, both being held by her in common. This question seems to be settled by the decision of the Supreme Court of the United States in *Smelting Co. v. Kemp*, 104 U. S. 654, 655, where the court, speaking through Justice Field, says: "The statute of 1872 provides that, on each claim subsequently located, until a patent is issued for it, there shall be annually expended, in labor or improvements, \$100, and on all claims previously located an annual expenditure of \$10 for each 100 feet in length along the vein; but, where such claims are 'held in common,' the

expenditure may be made upon any one claim. * * * Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed, or the improvements are made, for its development,—that is, to facilitate the extraction of the metals it may contain,—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the *debris* or waste material.”

But appellants claim that plaintiff is not entitled to have part of the expenditure made on the Morton in 1888 credited to the assessment work of the Gordon, for the reason that she did not prove that she was the owner of the Morton, and consequently there was a failure of proof to show that the two claims were “held in common.” It is true that plaintiff did not attempt to prove the location and record title of the Morton claim. She was not called upon to do it. Her title to that claim was not in dispute. She did prove actual possession and improvement of the same. From that the law presumes that she was the owner. Code Civil Proc., § 1963, subds. 11, 12. Such, also, has been the uniform ruling of this court in a line of decisions running through and found in nearly every volume of the reports, from the fourth to the present time. That presumption, of course, may be rebutted, in a proper case; but in this case there was no attempt to rebut this presumption of law. The case of *Jackson v. Roby*, 109 U. S. 444, 3 Sup. Ct. Rep. 301, cited by appellant, is not in point. There it was shown and held that the particular work claimed as development was not such, and was not of a character to develop the claim. None of the other cases cited by appellant are in conflict with the conclusion here reached.

It is also insisted by appellants that the court erred in refusing to give the fifth instruction asked by defendants. That instruction was to the effect that, even if plaintiff had expended \$500 in work on the Gordon claim prior to 1888,

she was not thereby excused from the necessity of doing the \$100 of assessment work in 1888, to prevent the claim from being subject to relocation. It was not error to refuse this instruction, for the reason that the court had already instructed the jury, (1) of its own motion, that, under the laws of Congress, the party holding the claim must make an annual expenditure of \$100 on each claim; and, * * * "if you shall find that the plaintiff did not make the expenditures on the Gordon claim in 1888, your verdict will necessarily be for the defendants in this case;" (2) at the request of defendants: "On each claim located since May 10, 1872, not less than \$100 worth of labor must be performed, or improvements made, each year; and upon failure to do so the claim is open to relocation in the same manner as if no location was ever made." Either of these instructions was less confusing, and more favorable to defendants, than the one refused.

Judgment and order affirmed.

WE CONCUR: PATERSON, J. WORKS, J.

1. The act of Congress of January 22, 1880, had the effect to extend the time for assessment to the end of the year, and was intended to render the period uniform. *Hall v. Hale*, 8 Pac. 580; 8 Colo. 351.

2. After failure to do the annual labor in a certain year the claimant will still keep his claim for the ensuing year by resumption of work, but need not proceed to complete a full assessment. *Belcher Co. v. Deferari*, 62 Cal. 160. But see *Honaker v. Martin*, 27 Pac. 397.

3. To retain his location, labor must be done before a hostile relocation. *Russell v. Brosseau*, 65 Cal. 605; 4 Pac. 643.

4. Work done on one of several claims. *Chambers v. Harrington*, 111 U. S. 350.

5. Not required after entry. *Alta M. Co. v. Benson Co.*, 16 Pac. 565; *Aurora Hill Co. v. S. M. Co.*, 84 Fed. 515; *Deno v. Griffin*, 20 Pac. 308.

6. Wrongful adverse possession of a mining claim excuses the rightful owner or locator from doing the annual labor during the time of such adverse possession. *Utah M. Co. v. Dickett Sul. Co.*, 21 Pac. 1002.

7. Re-entry and resumption of labor must be substantial. The carrying of timber and tools to the premises without using them, although they were paid for, will not count. *Honaker v. Martin*, 27 Pac. 397.

8. Failure does not work a forfeiture where there is a resumption. *Lacey v. Woodward*, 25 Pac. 785.

9. Development is a condition of continued ownership until patent is obtained. *Marshall v. Harney Peak Tin Co.*, 47 N. W. 290.

10. The construction of a wagon road to a mine is good annual labor. *Doherty v. Morris*, 28 Pac. 85.

11. Upon the issue of forfeiture, where a co-tenant colludes with the relocating title, his interest will be considered, in weighing his testimony denying labor done on his own claim. *Id.*

12. The amount paid for annual labor is not conclusive of the actual value. *Quimby v. Boyd*, 8 Colo. 194; *Id.*, 842.

13. The care and superintendence of the owner treated as enhancing the value of his labor. *McGrath v. Bassick*, 11 Colo. 528.

KING, Appellant, v. AMY & SILVERSMITH CONSOLIDATED MINING Co., Respondent.

(9 Montana, 548; 24 Pac. 200. Supreme Court, 1890.)

Where a vein leaves the side line its right to be followed on the dip is bounded by a plane drawn parallel to its end lines across the claim and protracted from the point where it departs from the side line.

¹ The location need not be substantially parallel to the side lines so as to make the dip substantially at right angles to the side lines, and in protracting a line to bound the following of the vein on the dip, a line drawn at right angles to the strike of the vein is not the line contemplated in such cases under the statute.

Appeal from District Court, Silver Bow County; before Justice DE WOLFE, without a jury.

The plaintiff is the owner of the undivided three fourths of the Non-Consolidated mining claim. The defendant is the owner of the other undivided fourth. The defendant is the owner of the Amy claim. The northerly side line of the Amy claim is the southerly side line of the Non-Consolidated. The west end line of the Amy is 491 feet long, and runs south 30 deg. west. The east end line is the same length and course. The north side line is 1,470 feet in length, and runs south 66 deg. 30 min. west. The south side line is the same length and course. The vein of the Amy claim, on its onward course or strike, passes through the north side line, and the apex thereof crosses said side line at a point 184 feet easterly from the west end line, and passes into the Non-Consolidated ground. Said vein runs on northwesterly, and does not again enter the Amy ground. The apex of the Amy vein passes out of the south side line of the location, at a point between the southeast corner of the Amy and a point 600 feet westerly therefrom. The dip of the vein is to the north. Four hundred and eleven feet of the north line of the Amy, commencing at a point seventeen feet east of the northwest corner, forms the south line of the Non-Consolidated. The west end line of the

¹ In the *Trio lode case* on bill for injunction (U. S. Circuit Court, Colorado, not reported,) *Hallett. J.*, held that a lode which leaves the side line could not be followed on its dip beyond a line drawn at right angles to its strike. *Morrison's Mining Rights*, 7th Ed. p. 115.

Non-Consolidated is 181 feet in length, and runs south 1 deg. 40 min. west. The east end line is 10 feet long, and the same course. The north side line is 372 feet long, and runs north 88 deg. 55 min. west. Each claim was located and patented subsequent to the passage of the United States mineral land act of May 10, 1872, and the amendments thereto, and is subject to the provisions of those laws.

The plat (Fig. 1) indicates the surface lines of the two claims, and the direction of the strike of the vein.

The plaintiff's action is for partition and accounting against the defendant, alleging that defendant has taken large quantities of ore from subterranean workings at a point north of the Amy north side line, which is the Non-Consolidated south side line. The only controversy is as to where the vertical end line bounding plane should be drawn downward as a limit of the mining operations of the defendant. Plaintiff contends that the Amy north side line should be considered the end line of that claim for all purposes, and that through that side line the vertical plane should be drawn downward perpendicularly, beyond which, to the north, the Amy company can not follow the vein on its strike or dip. The defendant's position is that the vertical bounding plane, limiting its rights, must be drawn downward at the point where the Amy apex crosses the north side line of the claim; such plane to be parallel to the planes of the end lines as located by the Amy. On the trial the court took a view at variance with those of both plaintiff and defendant, and held that the bounding plane must be placed at the point where the apex crosses the north side line of the Amy; but that such plane must be drawn downward at a right angle to the strike of the vein at that point. The plat (Fig. 1) indicates the positions of the three planes described. They intersect at a common point, (e, on the plat,) viz., the point of departure of the apex from the Amy exterior boundaries. Judgment was entered in accordance with the views of the District Court. The plaintiff appeals. The case comes before this court as a triangular contest. Since the decision below, the learned judge who tried the case appears

spondent, but the principles involved are vitally at variance. A decision as to which theory of the plane is the law in the case is the whole and only controversy. That decision will settle the title to the portion of the vein from which the ore was taken.

WILLIAM SCALLON and E. W. TOOLE, for appellant.

STEPHEN DE WOLFE and JOHN F. FORBIS, for respondent.

DE WITT, J. (after stating the facts as above).

The case at bar involves the construction of Section 2322 Rev. St. U. S., or, rather, the application of the facts of the case to that statute: "Sec. 2322. The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all * * * veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." As said by Mr. Justice Field (*Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 206): "This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. * * *

* The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein." We may add to these words that further difficulties arise when we are obliged to apply the statute to facts not wholly within its contemplation. If a mining location be made regularly—made so that the strike of the vein crosses the location from end line to end

line, and at right angles to said end lines—there is nothing in the statute to construe or interpret: *Flagstaff Co. v. Tarbet*, 98 U. S. 469; *Iron Silver Co. v. Elgin Co.*, 118 U. S. 205; *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 485. “There is no patent or latent ambiguity.” But when veins on their strike cross the side lines, or a side line and end line, at all conceivable angles, difficulties confront the courts that can best be fully met by legislative aid. Until such aid is invoked, the courts must follow the statute and previous construction as closely as the varying facts permit: *Iron Silver Co. v. Elgin Co.*, 118 U. S. 208. The history of mining has proven that the law of May 10, 1872, and amendments thereto, do not afford clear, adequate and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar is a notable instance. It is a first impression in this court, and all other appellate courts.

Three solutions of this interesting problem are urged upon our consideration. Neither one is absolutely free from possible criticism, in view of prior construction of the statute, applied to cases where the facts departed from the regularity seeming to be contemplated by the law. The facts in this case we can not ascertain have ever been before any court. We do not approach the consideration of the case with the assurance that we might possess were we able to follow a path that had heretofore been even partially opened. The situation is such that we do not feel prepared to pronounce an *ex cathedra* utterance. We are obliged to plow a furrow in virgin soil. It will be our endeavor to apply a view to the facts which shall seem to us most consonant with the true intent of the statute, and most in accord with the adjudicated cases in the United States Supreme Court, wherein the rights claimed under irregular locations have received the consideration of that court. Without attempting scientific discussion, we believe we can give a few practical definitions, to indicate the sense, from the miner's point of view, in which we shall use certain terms in this opinion. Experience has shown that the precious mineral deposits, except what are commonly called “placers,” as a rule lie in veins. Mr. Justice Miller (*Iron Silver Co. v.*

Cheesman, 116 U. S. 533) says: "What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted." Mr. Justice Field, in the *Eureka* case, 4 Sawy. 311, says: "A fissure in the earth's crust, an opening in its rocks and *strata*, made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode in the judgment of geologists; but to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock, lying within any other well defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of opinion therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock;" the "neighboring rock" being called in the miner's language the "country," or the "country rock." A vein, to the miner, is a body of ore, quartz or mineral-bearing substance, lying within the crust of the earth, bounded on each side by the country rock, greatly varying in width, and extending in length across and through the country for greater and less distances. The direction of the vein so across and through the country is called the "strike." The direction of the vein, as it goes downward into the earth, is called the "dip." The dip, in different veins, and in the same veins sometimes, varies from a perpendicular to the earth's surface to an angle, perhaps, only a few degrees below the horizon. The dip is spoken of from three different points of view: (1) As to its inclination from a perpendicular or a horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as having a dip of 20 deg., 30 deg., etc. (2) As to the direction it takes from the strike or apex, by the points of the compass. If the strike were due east and west, and the vein in its course downward departed from the perpendicular at an angle, so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft,

the dip, in this point of view, would be said to be due north, or, the conditions reversed, due south. In this respect the dip—that is, the direction of the dip—is said to be, and is, at right angles to the strike. (8) The dip is again spoken of as the portions of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthwise of the vein on a level; that is, when he is advancing along the vein, neither rising toward the surface of the ground nor descending, but going on a level with the plane of the earth's surface. A failure to distinguish these three views of the dip in using the word, sometimes leads to confusion. As we shall use the term "dip" frequently hereinafter, for the sake of definition, let us call the dip from the first point of view, the inclination dip, the second the compass dip, and the third the practical dip; for this is the practical idea of the miner when he speaks of following his dip.

Under these definitions, a vein absolutely perpendicular to the plane of the earth's surface, an occurrence rarely if ever encountered, has no inclination dip or compass dip. It has only the practical dip. But in actual mining, veins possess a dip from all three points of view. Keeping these definitions in view, we believe that some expressions of courts and arguments of counsel become more clear. This word "dip" is not used in the act of Congress cited above. The expression there is "course downward." "Dip" is the miner's word, which has attained the significations above defined. The highest point of such vein or body as we have described is the apex. The apex may or may not reach the surface of the ground. The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries, or which lies within perpendicular planes drawn downward indefinitely on the lines of those boundaries. The miner may follow the "dip," using the word in either of its significations, wherever it goes, provided he has the apex as a basis of operations, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give

the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires or is able to work downward, and that at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex: *Iron Silver Min. Co. v. Elgin Min. Co.*, 118 U. S. 205; 6 Sup. Ct. Rep. 1177.

It seems that such grant by the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all, and only that portion of the solid contents of the earth included in a parallelopipedon formed by dropping vertical planes downward on the line of each side of such parallelogram; and the intent of the statutory grant of Section 2322 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelopipedon indicated. Therefore, if the miner locates his claim regularly—that is, as the statute contemplates that he will—he has all that the statute intends to give him. See cases cited *supra*. If he “will not or can not make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences” (*Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 207); that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip. But, in order for the miner to make his location in exact conformity with the intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will locate so that the strike shall pass through the middle of each end line, leaving 300 feet of surface ground on each side of the vein. But the true strike is often ascertainable only after immense sums of money are expended in development. He has twenty days, under our statute, to determine this important matter, which may take years to fully demonstrate. If in this helpless condition the

prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of the opinion that the statute should be so construed as will come the nearest to giving to him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward.

In the light of these views, we will proceed to examine the three theories of the end line plane, presented for our consideration.

1. The court's theory. In this view the line that fixes the bounding plane is at right angles to the strike of the vein at the point where it leaves the Amy north side line. (On Fig. 1, the line is indicated by the letters *e. f.*) The plane drops perpendicular from that line. Counsel for appellant calls this a judicially established plane—a plane created by the court, and not by one of the location lines. Respondent's counsel, who holds this theory, vigorously protests against this term, and asserts that the plane is not judicially established, but is that intended by the statute. This, however, is only a terminological contention. Our own infirmity of language is such that we can not better designate this line and plane than as does appellant. It is in no sense an original line or plane of the surface boundaries as located, nor a projection of, or parallel to any of them. It is not a line fixed by location, nor ever fixed, except by the decree of the court below.

The United States Supreme Court cases cited by all the counsel are *Mining Co. v. Tarbet*, 98 U. S. 463 (*The Flagstaff Case*); *Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 196 (*The Horseshoe Case*); *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478. If there be one legal principle that is announced with more clearness and frequency than all others throughout all these cases, it is that "the boundary planes shall be definitely determined by the lines of the surface location, and that they shall not be subject to perpetual readjustment, according to subterranean developments made by mine workings." The *Elgin* case, 118 U. S.

207; see, also, 118 U. S. 205, 206. The bounding planes must be drawn by reference to the original surface location lines, and may not be established arbitrarily at the judgment of the parties, or the courts at a later day. The original location fixes the planes. We are forced to conclude that the court's theory is not in accord with this principle. The plane established is purely a judicial one. It has neither parallelism nor coincidence with, or projection from, or reference to, the planes of any of the original surface lines. It is not "determined by the lines of the surface location." It was never marked on the ground by the location, nor is it referable thereto. The whole theory of the advocate of this position is based upon the fact that he takes but one view of the dip—that which we have called the "compass dip." The dip, in this respect, is, as counsel insists, at right angles to the strike. Then, from this single point of view, he argues that, when the miner follows the dip, he may go downward from the apex only at right angles to the strike, and limited further by the planes of the original location end lines. We take his own language from his brief, as follows:

"The judge before whom the trial was had, held that lines drawn at right angles through the vein or lode, where it crossed the side lines, and these lines extended in the direction of the dip of the vein until it intersects a vertical plane drawn downward through the end lines of the location, and continued in the same direction to the place of intersection, constituted the true dip of the vein, and the part which the locator was entitled to follow in its downward course."

This is a fair and succinct statement of the position of the court below and counsel here. We can not but remember that this case not only determines the rights of the parties hereto, but that the decision will form an important precedent for future adjudication in the courts of this State. If we adopt the court's theory, we must abide by its legitimate consequences. The planes in this case would be drawn on the lines *e, f* and *g, h* (Fig. 1). We must then follow the plane *g, h*, until it meets the plane of the east original end line, the line *I, J*, on the figure, extended in its own direction northerly, which latter plane, in its northward course,

afterward meets the plane *e, f*. Thus, three end-line planes operate as boundaries, and the portion of the vein that the miner takes runs to a point. This result can not be the intent of the statute. This is not the section or block of the vein, in its entire depth, which the law intends to grant. Again (in Fig. 2), let a parallelogram, A, B, C, D, represent a location. The strike of the vein crosses the location, entering the east end line near the southeast corner, and passing out of the west end line near the northwest corner, as the line *g, h*, on the figure. The inclination of the dip is northerly. Counsel's westerly boundary plane on his theory would run northeasterly, at right angles to the strike at the point of departure from the west end line (the line *p, t*, on the figure). The section of the vein taken again runs to the point of a wedge. The miner is deprived of the portion of the vein on the dip lying north of the north side line, and between the plane of his artificially established end line (the line *o, t*) and the plane of the original west end line, D, A, projected in its own direction. This portion of the vein, it has never before been doubted that we are aware, would belong to the owner of the apex of the vein *g, h*, lying between the protected planes of the located end lines. Again, the vein may enter an end line, and pass out of the side line, as the line *m, n*, in Fig. 2; or take a deflection, as the lines *i, r, j*, or *k, s, l*. These are possible, and quite probable, and we believe actual, occurrences in fact. The application of counsel's theory leads to results from which we must retreat. In fact, in innumerable practical examples, where a claim is not located with absolute statutory regularity, the miner is entirely cut off from following his dip, and cut off at a greater or less depth, depending upon the inclination of the dip, and the angle at which the strike passes out of a surface line. In the case before us the court drew the boundary plane at right angles to the strike, as it seemed to be demonstrated, at the point of departure from the north side line. The departure at the south side line is not definitely determined. If, in its course over the Amy location, the vein takes a deflection, as seems probable from the findings of the court, the court's bounding planes will not be parallel and the portion of the even secured will run to a point or into a fan-shaped section.

If the court would draw the planes by reference to the general average strike of the vein throughout its whole extent, this could not be accomplished until extensive developments had been made on the vein over, perhaps, many locations thereon.

We are of the opinion that the view of the District Court is not sustained by the statute or the adjudicated cases, and that its adoption threatens the security of mining titles. We are therefore obliged to disavow its doctrine. This conclusion, however, does not determine the case. We are compelled to announce a construction of the law and the facts upon which judgment may be ordered entered below. This involves a discussion of the appellants' and respondents' theories. We will first examine the former.

2. The appellant's theory. The controlling principle of Section 2322, and the decisions thereunder, is that the miner has title to all veins the apex of which lies within the vertical planes of his surface lines, although such veins, in their inclination on their course downward, cross the vertical plane of a side line, provided that such exterior parts lie within the projected planes of the end lines.

We are unable to escape the conclusion that the application of the appellant's theory, in the case before us, violates this principle. Referring to the plat (Fig. 1), it will be seen that, if the Amy people go down upon their dip (using the word in any of its significations, and especially as to the compass dip) from any point on the apex, they will, at greater or less depth, depending upon the distance from the point where the apex crosses the north side line, encounter the vertical plane of that line; and if that plane is to cut them off upon the dip, and be the end line, the provisions of the statute and the universally accepted construction of the mining law are plainly subverted. Counsel holds that if the strike cross a side line, that such side line becomes an end line for all purposes. A better illustration of the revolutionary character of the theory could scarcely be presented than the one at bar. But, if it be correct, we must not shrink from its necessary results. Side lines are frequently not parallel. If the strike crosses two side lines not parallel, and these are made end lines, the section of

vein taken constantly narrows if the inclination be toward the small end of the location, or widens if the inclination be in the other direction. In fact all the supposititious cases applied to the court's theory develop equal disasters under the one now considered. Referring again to Fig. 2, the vein indicated by the line *m*, *n*, or *v*, *w*, will have bounding planes not parallel, but at an angle to each other, and often a right angle. If the compass dip were northeasterly, the section acquired quickly runs to a point. If it was southwesterly, it would develop into a fan of infinite proportions, unless we applied the two other lines of the claim as end lines, and had four in operation. The vein *i*, *r*, *j*, would have end lines coincident; that is, there would be but one end line. The single plane of the north side line would cut off a northerly dip in a short distance downward; or, if the dip were southerly, would counsel call into requisition the original end lines, after the vein passed the south side line plane, and have three end lines taking effect? And here we stop to observe that, in the discussion of each of the theories, we are considering the effects of the doctrines upon the portions of the vein on the dip lying outside of the vertical planes of the side lines. Those portions inside the vertical planes of the surface lines of the location are controlled by the general provisions of Section 2322. The appellant's view was urged in a learned argument by counsel; but we feel that we must conclude that in the case at bar it seems to be contrary to the theory and intent of the mining law. We are constrained to disavow the doctrine.

3. The respondent's theory. We have arrived at our approval of this doctrine, partially upon what the logicians call the principle of exclusion. We believe, however, that the position is independently sustainable by its own reason, and upon previous construction. Its advocate also protests against calling his line or plane a judicially established one, and contends that it is established by the original surface lines; that is, by reference thereto, under the control thereof, and in accordance therewith. In the *Elgin* case, 118 U. S. 206-208, 6 Sup. Ct. Rep. 1183, 1184, we find the following, in the opinion of Mr. Justice FIELD: "The surface side lines extended downward vertically, determine the extent of

the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. * * * It is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment, according to subterranean developments made by mine workings. * * * The provision of the statute that the locator is entitled throughout their entire depth to all the veins, lodes or ledges, the top or apex of which lies inside the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. * * * This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the *Flagstaff* case."

From those utterances, and from the tenor of this case, as well as the *Flagstaff* and *Argentine* cases, we believe that we may conclude that the bounding planes, sought to be applied in the respondent's theory to the facts of the case at bar, may properly be said to be "determined by the lines of the surface location." In the *Flagstaff* case and the *Argentine* case the strike of the vein was at right angles to the side line of the location, or, as the court in the former case says, practically so, and, for the purposes of the decision, treated as such. Therefore, in those cases, the vital matter before the court was not a question of the dip, but rather one of the strike, and the spirit of those cases seems to us to be that, when the strike passes out of the location through any surface line, that surface line, and its vertical plane, cut off the strike, and the miner may not follow the strike beyond such plane.

We are aware that there is language used in the *Argentine* case that looks toward the adoption of the appellant's theory herein, in the sense that the side line, under the circumstances of the case at bar, must be an end line to limit, by its vertical plane, the dip, as well as to stop the pursuit of the strike. But there is a vital difference between the facts of the *Argentine* case and those now before us, and the language therein must be viewed in connection with the

facts in the case before the learned justice. Chief Justice MARSHALL, in *Cohens v. Virginia*, 6 Wheat. 399, says: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Mr. Justice FIELD is the judicial father of the mining law of the United States. By his legal learning, and his practical knowledge of mining, he has illumined the path of the history of mining adjudications. His words in the *Argentine* case, and those of Mr. Justice BRADLEY in the *Flagstaff* case, were not spoken of facts such as those now before this court; and we can not consent that those distinguished jurists would admit that their language sanctions the doctrine that appellant applies to the Amy-Non-Consolidated situation. Turning to the *Horseshoe* case, the other of the three leading cases cited, the facts were also entirely variant from those now before us. These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mould into which they were forced. But we believe that we may legitimately conclude from those cases that, in the facts now before us, the principle is that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is that the locator may have his full section of the lode in its entire depth. But the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip, in that portion, lies under the apex of the

Non-Consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends; that is, at a point on the side line (point *e*, Fig. 1), and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end-line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line. Complications are soluble upon this theory. The intent of the statute seems to be secured.

We will notice some objections made to this doctrine, but which we believe are not sustainable. It is urged that the principle will not apply to a vein the strike of which crosses the location at exact right angles to the side lines. But here there would be no dip in question. The side line would bound the strike, as in the *Flagstaff* case. Again, it is suggested the Non-Consolidated surface location happens to be almost exactly parallel in its lines to the Amy. If the Non-Consolidated had been located with its end lines at right angles to the strike of the vein in the Non-Consolidated ground, that is, parallel to the court's line (Fig. 1), then it is objected that, if the Non-Consolidated go down on the dip, within the planes of such end lines, and the Amy go down within the planes as we define them, a collision would occur underground. If so, such conflict would be adjustable by priority of title. Again, it is urged that

the Amy has an apex on the surface of a length, as it runs from south to north side line, but that under this theory, at a depth, the strike is shorter, and only of a length equal to the shortest distance between the bounding planes. This objection is based upon an error in the geometrical view, as may readily be shown by descriptive demonstration. A level run on the vein at 100, 500, 1,000, or any number of feet in depth, would be parallel to the strike at the highest point, and of equal length. Of the three theories which have been presented to us for application to this case, we approve and adopt the last considered. In accordance with this view, let the judgment entered in the District Court be modified in this particular: that the plane bounding the portions of the dip of the Amy vein, lying north of and outside of the Amy north side line, shall be drawn from the point where the apex crosses that north side line, and in a direction north, 3 deg. west.

The case is remanded, with directions to the District Court to enter judgment accordingly.

BLAKE, C. J., and HARWOOD, J., concur.

1. Plaintiff showed entry and the taking of ore by defendants within his lines. Defendants claimed the right to enter and get such ore as parcel of an outside lode, on its dip within such lines. *Held*, that the burden of proof to show such fact was on the defendant. *Bell v. Skillicorn*, 28 Pac. 768.

2. The outcrop of a flat vein is not an apex within the meaning of the law so as to give the right to follow on the dip. *Duggan v. Davey*, 28 N. W. 887.

3. Apex rights, not presumed, when parties are working beyond side lines. *Cheeseman v. Shreve*, 37 Fed. 36.

4. Party beyond side lines *prima facie* trespasser. *Bluebird Co. v. Murray*, 23 Pac. 1022.

5. The grant of the surface over the dip does not count out the right to follow the dip underneath. *Cheeseman v. Hart*, 42 Fed. 98.

6. Burden of proof is on the party claiming the right to follow the vein beyond his side line. *Iron Silver Co. v. Campbell*, 29 Pac. 513.

WANDO PHOSPHATE CO. V. GEORGE E. GIBBON ET AL.

(28 South Carolina, 418; 5 S. E. Rep. 887; 18 Amer. St. Rep. 690. Supreme Court, 1888.)

Power of mine owner to revoke contract to mine. A phosphate company employed the appellees to work out the phosphate rock on their lands under written contract at so much per ton, the appellees covenanting to mine not less than 4,000 tons each year until the mines were exhausted. *Held*, that it was a contract for personal services only, and gave the employe no title or right of possession, and that the person so employed must quit on notice, holding the owner, of course, in damages for his breach of contract.

No title nor right to hold against the owner's will, goes with a mere contract to mine; the possession of the employe while it lasts is only a license to enter to perform the contract, and if the contract be revoked the right to hold possession ceases and damages is the only remedy.

Appeal from Common Pleas Circuit Court of Charleston County; FRASER, J.

Action for damages, with prayer for injunction, by Wando Phosphate Company against George E. Gibbon et al., for alleged trespass on land of plaintiff. There was a demurrer to the answer, which was overruled, and plaintiff appeals.

BARKER, GILLILAND & FITZSIMONS, for appellant.

SIMONS & SEIGLING and MITCHELL & SMITH, for respondents.

SIMPSON, C. J.

The appellant, being the owner of a certain tract of land situate in Charleston County, containing a deposit of phosphate rock, employed the defendants, respondents, to mine said lands under the following written agreement, to wit:

"*First.* That the said George E. Gibbon, Jr., and E. J. Hanahan, agree and contract to mine all the available phosphate rock on the lands of the Wando Phosphate Company near Bee's Ferry, in Charleston County, in the State afore-

said, and deliver the same, properly washed and weighed, to the said company, on board of lighters and vessels, at the wharf of the company, situate on said land, at four dollars and seventy-five cents (\$4.75) per ton, for each and every ton of 2,240 lbs. so mined, washed, weighed and delivered; provided, that if no vessel is ready to receive the rock, the same shall be dumped on the wharf, or on the adjacent land, at the option of the company.

"Second. The said Wando Phosphate Company agree to furnish to the parties of the first part a washer, engine, boilers, a railroad of necessary length, and having a track three feet wide, with proper switches and frogs, twenty cars of usual size, mules and whatever else may be necessary to constitute a plant suitable and proper for carrying on said mining operations, and shall pay to the said parties of the first part \$4.75 per ton for each and every ton of phosphate rock so mined, washed and delivered, as provided for in the first clause of this agreement, said payment to be made weekly or monthly.

"Third. The said parties of the first part agree to furnish the necessary labor, and to pay for the same, and also to feed the mules and defray all the other expenses necessary to the mining, washing and delivering of said rock, as hereinbefore provided for, keeping everything in order at their expense; damages, other than usual wear and tear to machinery, engine and boilers, excepted.

"Fourth. The said parties of the first part agree to mine not less than 2,000 tons of phosphate rock within one year from the time the plant hereinbefore provided for has been turned over to them, and to mine not less than 4,000 tons for each and every succeeding year until the mines are exhausted.

"Fifth. It is mutually agreed that in case the said parties to these presents shall differ as to what is 'available phosphate rock,' as provided for in the first article, or what is necessary to constitute a plant suitable and proper for carrying on said mining operations, as provided for in the second article hereof, such difference shall be submitted to arbitrators, one to be appointed by the party of the first part, and one by the party of the second part, with the right

to said arbitrators, in case they should not agree, to call in an umpire, and the award of said arbitration shall be final and conclusive on said parties.

"*Sixth.* The said parties of the first part are to have the use of the houses now standing on the said lands of the party of the second part.

"In witness whereof the said parties have hereunto set their hands and seals on the day and in the year first above written.

[Signed]	"G. E. GIBBON, Jr.	[L. s.]
	"E. J. HANAHAN.	[L. s.]
	"F. B. HACKER,	[L. s.]
	Pres. Wando Phos. Company."	

This agreement was entered into on the 22d November, 1881; and after the work had been carried on for several years thereunder, the appellant finding that they were suffering great loss on account of the decline in phosphate rock, on the 2d day of February, 1887, gave notice to the respondents that the work should be discontinued on and after the 5th day of February, when the property in possession of said respondents, including the lands, washer, railroad track, mules, and implements belonging to the appellant should be delivered up. This notice was disregarded by the respondents, who continued to hold possession of the property mentioned, after said notice, and also after frequent other notices of the same kind, continued to dig the soil and remove the rock. Whereupon the action below was commenced by the appellant, demanding judgment for damages in the sum of \$30,000 for the alleged trespasses; and, further, that respondents be enjoined from the further continuance of said trespasses and injuries. The respondents, admitting most of the allegations in the complaint as to the character of the work, etc., denied that they were trespassers, and, contending that they had performed and were performing their part of the contract above set out, interposed said contract as a defense to the action. The appellant demurred to respondents' answer, on the ground that it did not state facts sufficient to constitute a defense. This demurrer was overruled by his honor, T. B. Fraser, and the complaint ordered to be dismissed, with costs. The

plaintiff has appealed upon thirteen exceptions. The main point raised, however, is that his honor erred in holding that the respondents had the right to continue their work and employment until the "mines were exhausted;" that such was the meaning and intent of the contract between the parties; and that appellant had no right to discontinue said work so as to make the respondents trespassers. Error is alleged, also, to his honor, in dismissing the complaint without motion, or notice of motion, to that effect, and on demurrer to the answer. The other exceptions allege error more to the reasoning of his honor leading up to the holding suggested above, than to any principle of law directly involved.

We come now to the question, did his honor interpret correctly the contract between the parties? Was it a definite contract for the continuance of the work provided for therein until the mines should be exhausted, and, if so, did it authorize the respondents to hold onto the property after notice to quit, thereby constituting a good defense to the charge of trespass? There is no doubt that a party in the possession of the lands of another, acknowledged to be his, and of property like that mentioned here, using it, digging the soil, and removing the rock, etc., would be a trespasser, unless he is in possession as lessee, under a contract of rent, under an irrevocable license, or by permission and consent. It will be conceded, we suppose, that a party using the property of another—as it is admitted the respondents were using the property of the plaintiff here—to avoid being held responsible as a trespasser, would be required to show that he stood in relation to the owner in one or more of the conditions mentioned above. Now, was the contract under which the respondents hold, and upon which they rely, either a lease, a contract of rent, a license coupled with an interest, or a permission to hold and use, as claimed? It was certainly neither of the three first, and therefore they may be dismissed without further remark. The question, then, recurs, was it a permission, taking effect at the time of its execution, and at the beginning of the employment of the defendants, and to continue of force until the "mines were exhausted?" Were the terms used, to wit, "to fur-

nish not less than 4,000 tons for each and every succeeding year until the mines were exhausted," as found in the fourth paragraph of the contract, intended to indicate the duration of the employment, and so understood by the parties, or were they used merely to indicate the quantity of rock to be taken yearly from the mines while the mining continued, provided there was available rock present? We have felt great hesitation in reaching a conclusion on the first question, because, on the one side, if it was the purpose of these parties to fix definitely and positively a duration to their business obligations upon both sides, this certainly could have been done much more distinctly than by the phrase used. And besides, this phrase is found in a somewhat singular place in the contract, if such was its purpose. It is found in the fourth paragraph, which stipulates for the quantity of rock to be mined annually by the respondents, and seems to have been thrown in more for the benefit of said respondents than anything else, giving room for a decreased quantity, less than the 4,000 tons stipulated for, in case the mines should begin to run out, rather than to extend the contract to an indefinite period, to be measured and marked only by the exhaustion of the mine. And yet, on the other side, when the words employed are interpreted according to their ordinary and usual signification, there is ground for the position that the contract was to last as long as the mines furnished available rock to the extent of 4,000 tons per annum. But, be this as it may, there is certainly no express, formal provision in the contract obligating the plaintiff to continue the business of mining until the mines were exhausted, nor for any definite or fixed period. Nor do we think there is any necessary implication of such a result. It is true that the defendants stipulated and agreed to mine not less than 4,000 tons of rock for each and every succeeding year, until the mines were exhausted. And in another section of the contract the plaintiff stipulated to pay \$4.75 for each ton mined and furnished, etc.; but it nowhere appears clearly that the plaintiff contracted to keep the business running, even at a ruinous sacrifice, until the mines were exhausted.

There are two English decisions found in 5 Adol. & E.

(N. S.) which are very similar to this, and which we think should control here. In the first case, *Aspdin v. Austin*, p. 671, plaintiff agreed to manufacture for defendant cement of a certain quality, with the materials, machinery, and implements to be furnished by the defendant; the defendant engaging to pay £4 weekly during the two years following the date of the agreement, and £5 weekly during the next year following, and also to receive plaintiff into partnership at the expiration of the three years. Each party bound himself in a penal sum to fulfill the agreement. Held, that the stipulations in the agreement did not raise an implied covenant that defendant should employ plaintiff in the business during three or two years, though defendant was bound by express words to pay plaintiff the stipulated wages during those periods, respectively, if plaintiff performed, or was ready to perform, the condition precedent. In this case the plaintiff was discharged before the expiration of the period mentioned, and he brought action for damages on account of the discharge. In delivering the opinion of the court, Lord Denman, C. J., said: "The breach here assigned by the plaintiff assumes that the defendant, at however great loss to himself, was bound to continue his business for three years. But the defendant has not covenanted to do so. He has covenanted only to pay weekly sums for three years to the plaintiff, on condition of his performing what, on his part, he had made a condition precedent, and the plaintiff will be entitled to recover those sums, whether he performs that or not, so long as he is ready and willing and offers to perform it, and is prevented only by the defendant from doing it." The other case, *Dunn v. Sayles*, p. 687, was to the same effect, upon a similar contract. The court in these cases seem to have held that while the contract to pay the stipulated sums for the services to be rendered might be binding if the plaintiff was ready and willing to perform them, and was prevented improperly by the defendant, yet that defendant could not be required to continue the business against his will, and to his great injury. In other words, that he had the right to dismiss his employe, and to discontinue his business, at the peril of being held responsible for failure to comply with his contract to pay so much weekly, etc.

Now, in the case before the court. As we have already said, there is no distinct and positive contract on the part of the plaintiff that the business of mining shall go on until its mines were exhausted, which the plaintiff has breached by dismissing the defendants, and by virtue of which contract the defendants can hold onto the property in question after notice to quit. The contract which plaintiff has breached, if any, is like that in the two cases above cited, to wit, a contract to pay the defendants the sums stipulated for the rock to be mined. But the breach of this contract, if any, does not entitle the defendants to continue in possession of the property. Mr. Wood says: "When a servant is discharged, whether rightfully or not (*Ross v. Pender*, 1 Ct. Sess. Cas. (4th Sess.) 352), he must leave peaceably, and surrender to the master all property belonging to him, including a house, if he occupies it as a servant; and, if he fails to do so, the master may forcibly eject him from the premises (*Scougal v. Crawford*, 2 Murray, 110; *Bertie v. Beaumont*, 16 East, 34); and the fact that the servant leaves quietly, without protesting against his discharge, can not be construed as evidence of an acquiescence therein (*Champion v. Hartshorne*, 9 Conn. 564; *McAlister v. Ogle*, 1 Ir. Jur. (N. S.) 313); for it is his duty to leave peaceably, and he does no more than his duty by quietly departing." Wood, Mast. & Serv. (2d Ed.), § 144.

In each of the cases in Adol. & E. above, the employe brought the action, relying upon an alleged breach of the contract between the parties—that the employer had discontinued the work, and discharged the plaintiff without cause, before the expiration of said contract. The court held that there was no covenant, either express or implied, that the work should continue, and therefore the action could not be sustained; saying that the breach assigned should have been the failure to pay the stipulated wages during the specified time, for which there was a contract. So here. The defendants interposed the agreement, setting up the defense that they had the right thereunder to continue the work until the mines were exhausted. The circuit judge sustained this defense by overruling the demurrer. We think this was error, for the reason, like

the cases cited *supra*, there was no contract for the continuation of the work for a definite or indefinite period. Whether there was a contract that defendants should be employed to the extent of furnishing 4,000 tons of rock per annum until the mines should be exhausted, at \$4.75 per ton, is not one of the issues in the pleadings, and is not, therefore, directly involved. But assuming that it is, and that such a contract was made, and that, being under seal, based upon mutual promises and stipulations, and in every way founded upon a sufficient legal consideration, it is a valid contract, binding and obligating upon both parties, and further, that it has been breached, what is the remedy, and what is the relief to which the defendants are entitled? The remedy for a breach of contract depends entirely upon the nature and character of the contract breached. If it be a contract by which the party of the second part has acquired the possession of property, real or personal, as a purchaser, lessee, or otherwise, of a defined interest, as a term of years, etc., or a license coupled with an interest irrevocable, we suppose that he could retain possession. Or if it be a contract which the courts would specifically enforce according to its terms, he might obtain such enforcement. Or if it be a contract the breach of which sounds in damages only, his remedy would be an action for damages, and his relief a recovery of such damages as the facts required. In the first class he could retain possession, because his possession is founded upon title. In the second, if in possession, he could still retain it, because the courts would enforce a specific performance, if he was out of possession, by putting him in possession. But in the last class his rights rest in contract, which has given him no defined interest in possession, but simply an agreement to have a certain thing done or not done, the violation of which entitles him, not to have the agreement fulfilled specifically, but to damages in case of a failure to comply. Take the case of an overseer, an agent, or clerk employed for a certain number of years, and dismissed without sufficient cause before the expiration of the contract, could he still perform the stipulated duties in defiance of the dismissal of the employer, *per force*? Would this be his legal

remedy? Or would not an action for damages be the legal and proper course? We think the respondents occupied the relation of ordinary laborers to the appellant—employes to do a certain work—their possession being his possession; and that possibly they were employed to do this work “until the mines were exhausted,” and that the appellant has broken this employment at the peril of being subjected to pay such damages as the respondents may have sustained. But we do not think that the respondents bought any right or title to the property in question, nor was the contract such a contract as the court of equity would specifically enforce, and in that way authorize them to hold to their possession, but it is a contract sounding in damages, for the breach of which their only remedy is an action for damages, and that, since the service of notice to quit upon said defendants, their possession has been without authority, and therefore the action below is maintainable, it being substantially an action for exclusive possession on the part of the appellant. See the principle laid down by Wood, Mast. & Serv., quoted above, extracted from the cases which he cites *supra*. The main ground of our conclusion is that, even admitting the contract to have been a contract until the mines were exhausted, (which question we do not adjudicate decisively,) yet it was a contract involving personal services only, and gave no title to the property, either real or personal, or any right to possession or use as against the true owners, and therefore that defendants could not continue to hold in defiance of the demand of the appellant, the admitted owner. See Wood, Mast. & Serv. (2d Ed.), § 155: “When a servant occupies a dwelling house as accessory to the performance of his duties, he is not a tenant, and, if he is discharged, his right to possession ceases, and he must surrender, or he may be forcibly ejected. And when the servant is discharged, the right of the master to enter does not depend upon the question whether he has been rightfully or wrongfully discharged, but exists in the one case as well as in the other; the master incurring the peril of paying damages if the discharge is wrongful. But the right to expel the servant from the house exists, whether he had good

cause or not." Their remedy, if they have any, being, as we have said, an action for damages for breach of contract. If they were out of possession, they certainly could not be put into possession by a specific enforcement of the agreement, for the reason that the contract was neither a contract for the purchase of land, nor of anything else having a special value over and above an ordinary pecuniary one, giving rise to equity jurisdiction in such cases. And being in possession, they can not hold possession, for the same reason.

Our judgment is that the demurrer should have been sustained in so far as it negatived the answer as a bar to the action, and that the case should have proceeded on the claim of appellant for damages, if any, and his right to the restraining order prayed for. The conclusion above renders a discussion of the other questions raised unnecessary.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded.

McIVER and McGOWAN, JJ., concur.

1. Agreement to take all the coke in connection with stipulation for certain quantities. *Eastern Counties Ry. v. Phillipson*, 16 Com. B. 2.
2. Sufficient tender of coal. *Coit v. Houston*, 8 John.
3. Construction of coal monopoly contracts. *Arnott v. Pittston C. Co.*, 23 Amer. R. 190; *Morris Run C. Co. v. Barclay C. Co.*, 8 Amer. R. 159.
4. Driver of artesian well to be paid if he struck certain amount of water, earns his pay although the water is not fit for intended use. *American Well Works v. Rivers*, 86 Fed. 890.
5. Contract to enter coal land is against public policy where the buyer has already exhausted his right. *Johnson v. Leonhard*, 20 Pac. 591.
6. Special contract to carry coal at favoring rates not upheld although based on alleged equitable considerations. *Goodridge v. U. P. Ry.*, 87 Fed. 182.
7. A stipulation to use "economy" in the management of a mining enterprise is too uncertain to treat as a condition upon which forfeiture could be decreed. *Benavides v. Hunt*, 15 S. W. 396.

MCKINLEY V. WHEELER ET AL.

(180 U. S. 630. Supreme Court, 1888.)

¹ **A corporation may locate.** A corporation, created under the laws of one of the States, and all its members citizens of the United States, is competent to locate, or join in the location of a mining claim upon the public domain in like manner as individual citizens.

Considered as one person. Whether such a corporation will not be treated as one person, and as entitled to locate only to the extent permitted for a single individual, *quaere*.

May appear at district meetings. A corporation interested in mining may be represented by its officer or agent at any meeting of miners called together to frame rules and regulations in their mining district.

Error to the Circuit Court of the United States, District of Colorado.

This was an action for the recovery of an undivided interest in a mine. Defendants demurred to the complaint, and the demurrer was sustained and the action dismissed. Plaintiffs sued out this writ of error. The case is stated in the opinion.

Mr. Assistant Attorney General MAURY, for plaintiff in error. Mr. HUGH BUTLER was on the brief for same.

Mr. T. M. PATTERSON, for defendants in error. Mr. C. S. THOMAS was with him on the brief.

Mr. Justice FIELD delivered the opinion of the court.

This is an action for the possession of an undivided half interest in a mining claim known as the Vallejo lode, in the mining district of Roaring Forks, in the County of Pitkin, Colorado.

The plaintiff derives whatever interest he possesses by purchase and conveyance from the Josephene Mining and Prospecting Company, a corporation organized and existing under the laws of Colorado, for the purpose of prospecting

¹ *Thomas v. Chisholm*, 18 Colo. 105.

for valuable mineral deposits in the public domain of the United States in that State. The Vallejo lode was discovered and located by that company and two persons named Charles Miller and James W. McGee, the location being in their joint name, one-half interest for the benefit of Miller and McGee, and the other half for the benefit of the members of the corporation. At the time of the discovery and location all the members of the corporation were citizens of the United States, and were severally and individually qualified and competent to enter upon the public domain and acquire title to mineral lands upon it by discovery and location.

The complaint, in addition to these facts, alleges that on the 11th of March, 1884, the plaintiff was and has since been the owner of an undivided half interest in the mining claim mentioned, which is described by metes and bounds as set forth in the original location certificate, and was then and has ever since been entitled to its possession; that on the 20th of October, 1884, the defendants entered upon the premises and wrongfully and unlawfully excluded the plaintiff therefrom, and have ever since thus excluded him, to his damage of one thousand dollars. He therefore prays judgment for the possession of an undivided half interest in the mining claim and for the damage alleged.

To this complaint, the material facts of which are set forth in two counts, the defendants demur on several grounds, some of which are mere formal objections, but one of which is as follows: "Because the plaintiff bases his title or claim of ownership to an undivided one-half of the said Vallejo lode mining claim upon a purchase and conveyance from the Josephene Mining Company, a locator of said claim, and that said company, whether a corporation or partnership, was and is incapable of originally locating a mining claim in whole or in part, under the statutes of the United States or of the State of Colorado."

After argument the court sustained the demurrer, and entered judgment dismissing the action with costs against the plaintiff, who has brought the case here on a writ of error.

As this appears, the sole question presented for our determination is whether a corporation created under the laws of

one of the States of the Union, all of whose members are citizens of the United States, is competent to locate or join in the location of a mining claim upon the public lands of the United States, in like manner as individual citizens. The question must, of course, find its solution in the enactments of Congress.

Section 2319 of the Revised Statutes provides as follows:

"All valuable mineral deposits in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

It will be observed that no prohibition is here made against citizens of the United States uniting together for the occupation and purchase of public lands containing "valuable mineral deposits." Nothing is said of partnership or associations, or corporations; it is to citizens that the privilege is granted, and that they may unite themselves in such modes in all other pursuits was, as a matter of course, well known to those who framed as well as to those who passed the statute. There was no occasion for special reference to the subject to give sanction to these modes of uniting means to explore for mineral deposits and to develop them when discovered. Many branches of mining, and those which yield the largest returns, can be carried on only by deep excavations in the earth and the use of powerful machinery, requiring expenditures generally far beyond the means of single individuals. In lode mining especially, such excavations extend in most cases hundreds of feet, in many cases thousands of feet into the earth, where, for successful working, the steam engine of great power is as essential an instrument as the pick and the shovel. It was expected, of course, that mining would continue after the passage of the act as before. No change in that respect was needed or asked for. The object of the act of May 10, 1872, 17

Stat. 91, C. 152, Sec. 1, from which the provisions of Sec. 2319 were carried into the Revised Statutes, was "to promote the development of the mining resources of the United States." It is so expressed in its title, and such development is sought to be promoted by indicating the manner in which claims to mines can be established and their extent, and by offering a title to the original discoverer or locator who should develop the mine discovered and located, or to his assigns.

At the present day, nearly all enterprises for the prosecution of which large expenditures are required, are conducted by corporations. They occupy in such cases almost all branches of industry, and prosecute them by means of the united capital of their members with increased success. In many States they are formed under general laws, by a very simple proceeding, by an instrument signed by the proposed members agreeing to thus unite themselves, stating their number, the object of their incorporation, the proposed capital, the number of shares, the period of duration and the officers under whose direction their business is to be conducted. Such a document being acknowledged by the parties and filed in certain designated offices, a corporation is created. The facility with which they may be thus formed, and the convenience of thus associating a number of persons for business have led to an enormous increase of their number. They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution. We think, therefore, that it would be a forced construction of the language of the section in question, if, because no special reference is made to corporations, a resort to that mode of uniting interests by different citizens was to be deemed prohibited. There is nothing in the nature of the grant or privilege conferred which would impose such a limitation. It is in that respect unlike grants of lands for homesteads and settlements, indicating in such cases that the grant is intended only for individual citizens.

The development of the mineral wealth of the country is promoted instead of retarded, by allowing miners thus to unite their means. This is evident from the fact that so soon as individual miners find the necessity of obtaining

powerful machinery to develop their mines, a corporation is formed by them, and it is well known that a very large portion of the patents for mining lands has been issued to corporations.

If we turn now to other provisions of the Revised Statutes we find that the conclusion which we have reached is justified by their language. Section 2321 provides as follows:

“Proof of citizenship under this chapter may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.”

Again, Sec. 2325, in stating the manner and conditions under which a patent for a mining claim may be obtained, provides as follows:

“A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for patent, under oath, showing such compliance,” etc.

It will be thus seen that the statute itself assumes what one would naturally infer without reference to it, that citizens of the United States are permitted to enjoy the privilege which is granted to them in their individual capacity, though they may unite themselves into an association or corporation.

The doctrine is well established that rights with respect to property held by citizens are not lost because they unite themselves into corporate bodies. They are subsequently as able to invoke the law for the enforcement of their rights as previously, the court in such cases looking through the name in order to protect those whom the name represents. We have an illustration of this, as applied to corporations, in the construction given to the clause of the Constitution

which extends the judicial power of the United States to controversies between citizens of the States and aliens, and between citizens of different States.

In *Bank of the United States v. Deveaux*, 5 Cranch, 61, 87, the question arose whether a corporation composed of citizens of one State could sue in the Circuit Court of the United States a citizen of another State, and it was answered in the affirmative. In deciding the question, the court, speaking by Chief Justice Marshall, said: "However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they are allowed to sue by a corporate name. That name, indeed, can not be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals. Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."

The doctrine of this case has been followed and is now the settled law in the courts of the United States. On the same principle, provisions of law, in terms applicable to persons, securing to them the enjoyment of their property, or affording means for its protection, are held to embrace

private corporations. The construction given to the sixth article of the definitive treaty of peace of 1783 between Great Britain and the United States illustrates this: 8 Stat. 83. That article provided that there should be "no future confiscations made, nor any prosecutions commenced against any person or persons, for, or by reason of, the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage either in his person, liberty or property." An English corporation held in Vermont certain lands granted to it before the Revolution, and the legislature of that State undertook to confiscate them and give them to the town where they were situated. The English corporation claimed the benefit of this article, and recovered the property against the contention that the treaty applied only to natural persons, and could not embrace corporations because they were not persons who could take part in the war, or could be considered British subjects, this court, speaking by Mr. Justice Washington, observing that the argument proceeded upon an incorrect view of the subject, and referring to the case of *Bank of the United States v. Deveaux*, to show that the court, when necessary, will look beyond the name of a corporation to the individuals whom it represents: *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 491. Many other illustrations of the doctrine might be cited.

We are of opinion that the same rule of construction should control in this case, and that, in accordance with it, Sec. 2319 of the Revised Statutes must be held not to preclude a private corporation formed under the laws of a State, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States. There may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer. It may perhaps be treated as one person and entitled to locate only to the extent permitted to a single individual. That question, however, is not before us and does not call for an expression of opinion.

The objection to this construction arising from the fact that the section gives force, in the location of claims, to the

rules and customs of miners, so far as applicable, when not in conflict with the laws of the United States, does not strike us as of great weight. A corporation interested in mining may be represented by an officer or agent, at any meeting of miners called together to frame such rules and regulations in their mining district. Corporations engaged in other business are constantly represented in this way at meetings called in relation to matters in which they are interested. There is nothing in the nature of mining to prevent such a representation of a corporation, when rules to control the acquisition and development of mines are to be considered and settled.

It follows that the judgment of the court below must be reversed and the cause remanded, with directions to *overrule the demurrer of the defendants, and to take further proceedings in accordance with this opinion.*

1. Acts of board may be shown without their official record. *Mining Co. v. Anglo-Cal. Bank*, 104 U. S. 192. They may act so as to be bound, without keeping minutes of their action. *Smith v. Woodville M. Co.*, 5 Pac. 638; 66 Cal. 398.

2. When a corporation has a general superintendent, service on the mine foreman is not good. *Great West M. Co. v. Woodmas Co.*, 12 Colo. 46.

3. Acceptance of charter by meeting held out of State not valid. *Smith v. Silver Valley Co.*, 64 Md. 85; 54 Am. Rep. 760.

4. Wafer good as corporate seal. *St. Phillips Church v. Zion Church*, 23 S. C. 297.

5. Power to impose license fee and other condition on foreign corporation. *Pembina M. Co. v. Pennsylvania*, 125 U. S. 181.

6. Redemption of mine by directors who were decreed to hold in trust with allowance for expenditures. *Wasatch Co. v. Jennings*, 15 Pac. 65.

7. *Laches* in bringing suit bars complaining stockholders, and they must seek relief through the board before suing the company. *Taylor v. Holmes*, 127 U. S. 489.

8. A corporation working beyond its period of statutory legal existence is liable for its torts during such period. *Miller v. Newburg Coal Co.*, 81 West Va. 836.

9. On dissolution of a corporation, each stockholder has the right to have the partnership property converted into money. *Mason v. Pewabic M. Co.*, 133 U. S. 50. The assets are a trust fund. *St. Louis M. Co. v. Sandoval M. Co.*, 116 Ill. 170.

10. Directors of a corporation holding over after lapse of its charter will be held to account in equity. *Mason v. Pewabic Co.*, 133 U. S. 50.

11. Estoppel to deny corporate existence. *Liter v. Ozokerite Co.*, 27 Pac. 690.

12. Effect of failure to file charter. *King v. National Co.*, 4 Mont. 1.

13. Single act of business in Colorado by foreign corporation is not doing business within the State such as to require filing of its articles, etc. *Colo. Iron Works v. Sierra Grande Co.*, 25 Pac. 325.

14. A foreign corporation bought and sold a lode in Colorado without complying with the statutory requirements as to filing copy of charter, etc. *Held*, that title passed without regard to such non-compliance. *Fritts v. Palmer*, 132 U. S. 282.

15. Mere trespasser can not question the capacity of the corporation to hold property. *Golden Gate Co. v. Joshua Hendy Works*, 28 Pac. 45.

16. Conveyance by the corporate seal does not pass title without the consent in writing of two-thirds of the capital stock. *McShane v. Carter*, 22 Pac. 178; *Pelican Co. v. Kennedy*, 22 Pac. 681.

17. A mortgage executed by the president and secretary without a resolution of the board is invalid under Cal. Code although ratified by the holders of two-thirds of the stock. *Alta M. Co. v. Alta Placer Co.*, 21 Pac. 873.

18. Articles providing that the corporate affairs should be controlled by certain officers and not the statutory directors do not make a *de jure* corporation. *Bates v. Wilson*, 24 Pac. 99.

19. A corporation can not recover on paper given for the personal accommodation of its officers. *Society des Mines v. Mackintosh*, 24 Pac. 669.

20. Sufficient proof of services by officers to warrant payment. *Graves v. Mono Lake Co.*, 22 Pac. 665; *Smith v. Woodville Co.*, 66 Cal. 398.

21. Personal liability of stockholders of a foreign corporation is fixed by the laws of the chartering State, but it may be enforced wherever the parties are found. *First Nat. Bank v. Gustin Minerva M. Co.*, 12 Minn. 327; 18 A. S. Rep. 510.

22. Rights of creditor, where he is aware that stock of company has not been paid up, and non-liability of holders of later issued stock in such case, stated. *Id.*

23. In case of payment for stock with mines at an excessive valuation, subsequent purchasers of stock are not liable to creditors on that ground. *DuPont v. Tilden*, 42 Fed. 87.

24. The plaintiff bought stock of the company which employed him, upon an agreement that his money should be refunded and the stock returned, if discharged. *Held*, that the transaction made the plaintiff not a creditor but a shareholder. *Yeaton v. Eagle Oil Co.*, 29 Pac. 1051.

25. Case of exclusion of certain organizers from subsequent meetings of company. *Summerlin v. Fronteriza Co.*, 41 Fed. 249.

26. In a suit by a stockholder for a receiver and for an account, charges of general mismanagement are insufficient; specific facts must be stated and relied on. *Robinson v. Dolores Canal Co.*, 29 Pac. 750.

27. Where the owners of mines who had incurred debts for expenses formed a company to which they conveyed and became its stockholders, such company can not be held for such debts without affirmative action on its part. *Ruby Chief M. Co. v. Gurley*, 29 Pac. 668.

28. Construction of the California Act requiring corporations to re-

port periodically their accounts and the state of the mine; the same held to apply to companies operating mines in other States. *Eyre v. Harmon*, 28 Pac. 779.

29. Under the Idaho Corporation Act, stockholders are individually liable for debts of the company, and a joint or several action will lie for the collection of the same. *Sparks v. Lower Payette Ditch Co.*, 29 Pac. 134.

30. A corporation to mine and manufacture lime has no right to buy goods to be resold beyond the purposes of a supply store. *Chewacla Lime Works v. Dismukes*, 6 So. 122.

31. Where, by the charter, no stockholder may cast more than one-fourth of all the votes, he can not evade this provision by gratuitous distribution of his shares to others. *Mack v. DeBardelaben Co.*, 8 So. 150.

PACIFIC COAST MINING AND MILLING CO. v. SPARGO
ET AL.

SAME v. FICK ET AL.

(16 Federal Reporter, 848. In the Circuit Court of the United States;
District of California, 1883.)

An agricultural patent carries all mines and minerals within its bounds, unless specially excepted from the grant.

¹The exception in favor of the proprietor of veins or lodes dipping underneath the land granted construed to be an exception in favor of the proprietors only of lodes located before the patent issued.

Patent carries back to entry. Where land is entered and paid for, and the receiver's receipt issued, the United States retains no real interest in the land; when the patent goes it relates back to the date of entry, and all claims intervening between entry and patent are cut off.

A reservation relates back, the same as the granting clauses of the patent.

At law.

GARBER, THORNTON & BISHOP and F. W. COLE, for plaintiff.

C. W. CROSS, for defendants.

SAWYER, J.

In the first case the grantor or plaintiff entered and paid for the land described in the complaint at the rate of \$1.25 per acre, at the proper land office, and received his certificate of purchase on December 19, 1874. In pursuance of his purchase a United States patent in the usual form issued to him on September 6, 1876. In March, 1880, the grantors of defendants located, in the usual way, a gold-bearing quartz lode, under the surface, on the land in question, which they and the defendants worked under ground by means of a tunnel extended into it from without the boundaries of the land. Defendants claim title under this mining location. The patent to the plaintiff's grantor contained the clause:

¹ Followed; *Amador Co. v. South Spring Hill Co.*, 36 Fed. 663.

"Subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and also subject to the right of *the proprietor of a vein or lode* to extract and remove *his ore* therefrom, should the same be found to *penetrate or intersect the premises hereby granted, as provided by law.*"

Defendants insist that the mine subsequently located is embraced in this provision: "Also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law." The language of the exception, strictly construed, seems to refer only to mines located outside the lands which, by their dip or inclination, penetrate or intersect the land patented, and not to mines discovered and located within it. But, however this may be, the language certainly does not mean parties claiming to be "proprietors" who locate mines after the issue of the patent, but only persons who are "the proprietors" of mines at the time when the patentee's rights attached. When the patent issues, it covers everything embraced in the land to which no prior right has attached, otherwise the patent would not have reserved the rights of "the *proprietor of a vein,*" but would have reserved *the vein itself.* There can be no right of a "proprietor" to reserve unless there is a proprietor who has rights to protect at the time the reservation is made. The patent passed the entire title as against any subsequent locator, and, that being so, no legal right could be acquired against the patentee by a subsequent location. No man could become the proprietor of a mine already granted, except by purchase from the grantee. The patent can not be attacked collaterally in this action. The land officers were charged with the duty of ascertaining whether the lands were subject to be patented or not, and their determination is conclusive; at least, in this action.

The case of *Steel v. St. Louis Smelting Co.*, 106 U. S. 447, decided at the present term of the Supreme Court, is em-

phatic on this point. But the same principle has been established by numerous prior decisions of that court: *Smelting Co. v. Kemp*, 104 U. S. 636; *Quinby v. Conlan*, Id. 426; *Moore v. Robbins*, 96 U. S. 530; *Shepley v. Cowan*, 91 U. S. 330; *Johnson v. Towsley*, 13 Wall. 72; *Vance v. Burbank*, 101 U. S. 519.

In the other case, against *Fick et al.*, the grantor of the plaintiff entered the land, paid for it, and received his certificate of purchase on December 19, 1874. The mining location of defendants was made August 14, 1875, while the patent issued upon the certificate of purchase is dated September 6, 1876. The difference between this and the other case is that in this case the mining location was made after the entry and payment for the land, but before the patent issued; while in the other, the mining location was not made till after the patent issued. But this can make no difference in the rights of the parties. The purchaser became the equitable owner of the land the moment he entered and paid for it, and received his certificate of purchase. From that time the United States had no real interest in the land. It only held the dry legal title in trust for the purchaser, pending the usual necessary delay in issuing patents, and the patent only perfected the title, the right to which had already vested. Lands cease to be public lands when entered and paid for: *People v. Shearer*, 30 Cal. 648; *Gwynne v. Niswanger*, 15 Ohio, 368; *Astrom v. Hammond*, 3 McLean, 108; *Carroll v. Perry*, 4 McLean, 26; *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210, 219; *Hughes v. U. S.*, Id. 232; *Union M. Co. v. Dangberg*, 2 Saw. 454.

When the patent finally issues it attaches itself to the entry and relates to the date of the entry. It is regarded, for the purpose of protecting the rights of the patentee against parties seeking to acquire intervening rights, as if issued at the date of the entry. The entry and patent are regarded as one title. *Bagnell v. Broderick*, 13 Pet. 450; *Gibson v. Chouteau*, 13 Wall. 93; *Shepley v. Cowan*, 91 U. S. 337; *Smelting Co. v. Kemp*, 104 U. S. 647; *Hayner v. Stanly*, 8 Saw. 225; 13 Fed. 217. The title of the plaintiff

dates from the date of the entry and payment, and not from the date of the patent; and the reservation in the patent relates to that date, and therefore antedates the mining location of the defendants. *The plaintiff in each case has the legal title to the mine, as well as the land, and is entitled to recover the lode from which it has been ousted, and it is so ordered.*

¹ CHEESMAN ET AL. V. SHREVE ET AL.,

(87 Federal Reporter, 86. In the Circuit Court of the United States;
District of Colorado. 1888.)

The dip right a federal question. The claim of right to follow the dip under terms of Sec. 2322, R. S. U. S., makes a substantial question involving construction of a Federal statute and giving Federal jurisdiction.

¹**Prima facie trespassers.** Parties claiming the right to pass beyond their own lines within the lines of another in the exercise of the right to follow the dip, are *prima facie* trespassers.

Preliminary injunction. Where the affidavits are conflicting, a preliminary injunction will be issued against alleged trespassers, leaving the question of the title to the property to be settled by a suit at law.

In Equity. On bill for injunction.

Application for injunction by Walter S. Cheesman and others against James A. Shreve and others to prevent trespass upon mining lands.

C. J. HUGHES, JR., for complainants.

B. F. MONTGOMERY, for defendants.

BREWER, J.

These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States, and especially Section 2322 of the Revised Statutes, which give to the owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. Involved in their claim is the question whether there is such a vein as is provided for in that section; a question as to the right of entrance, as affected by priority of location and the dip of

¹ *Blue Bird Co. v. Murray*, 28 Pac. 1022.

the vein. These questions are presented, and, whatever may be the true answers thereto, it is obvious, from past judicial expressions, that they can not be considered as a mere sham, or pretended, but as real, substantial questions. Hence, as questions arising under the laws of the United States, they present a case cognizable by the court: *Frank M. Co. v. Larimer Co.*, 8 Fed. 724; *Starin v. New York*, 115 U. S. 248. As the defendants are entering within the side lines of complainant's property, *prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction, are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law. Temporary injunction will issue upon the giving of a bond in the sum of \$25,000, conditioned according to law.

MONTANA CO., LIMITED, V. CLARK ET AL.

(42 Federal Reporter, 626. In the Circuit Court of the United States; District of Montana, 1890.)

Triangle shaped claim. When a claim is located in the form of an isosceles triangle, the locators can not follow down their vein on its dip beyond the exterior lines of the location. Parallelism in end lines is essential to the exercise of such right.

¹ **Veins within lines extended downward vertically but its apex outside.** Defendants owned a claim which included the apex of a vein which dipped under, and so, on its dip, came within the lines of plaintiff's adjoining claims. The defendants, although covering the apex, could not follow down underneath plaintiff's claim because defendant's end lines were not parallel. *Held further*, that plaintiff was not the owner of the vein underneath its own side lines because it did not have the apex within its lines.

Destruction of tunnel enjoined, though both parties without title. Plaintiff had already run a tunnel into and defendant was driving an incline toward, parcel of a lode, the title to which the court considered to be in the United States—the incline threatening to break in and destroy plaintiff's tunnel. *Held*, that defendant should be enjoined from breaking into the tunnel, and so interrupting the first possession of plaintiff.

¹ See *Gilpin v. Sierra Nev. Co.* 28 Pac. 547.

In equity. Bill for an injunction.

Rev. St. U. S. § 2322, provides that the locators of all mining claims shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location.

CULLEN, SANDERS & SHELTON and E. W. TOOLE, for complainant.

McCONNELL & CLAYBERG, for defendants.

KNOWLES, J.

The plaintiff moves for a judgment on the pleadings. This presents the question as to whether there are any material issues presented by them. The plaintiff sets forth that it is the owner in fee simple of the Drum Lummon lode claim and the Marble Heart lode claim, and of all the precious ores therein contained, and was, at the commencement of this suit, in the possession of said premises, except so much as defendants wrongfully withheld from it; that in said premises is a vein or lode which runs through said Drum Lummon lode claim, and on its dip passes out thereof into the said Marble Heart lode claim; that plaintiff has for a long time past been engaged in working and mining upon said lode claims, and at great cost and expense has driven tunnels and drifts in, along and upon said vein or lode, from said Drum Lummon claim into said Marble Heart claim, which are necessary in order to enable plaintiff to work and mine its said mining claims; that defendants, commencing upon the Hopeful claim, have drifted into said Drum Lummon lode or vein in the Marble Heart claim, and have approached so near to the tunnels, drifts and workings of plaintiff in said claim as to endanger the same, and destroy them and the use thereof by plaintiff, and that

defendants threaten, by means of their shaft or incline, to enter into the tunnels, drifts and workings of the plaintiff, and to destroy the same, and to deprive the plaintiff of the use of the same, and are so near to the workings of plaintiff as to be dangerous to plaintiff's workmen and employes, and, if permitted to continue, will greatly damage and injure plaintiff's property; and that defendants threaten to enter into plaintiff's Drum Lummon lode, and to extract the ores, quartz rock and precious metals therein contained. The defendants in their answer do not deny the title of the Drum Lummon lode claim and Marble Heart lode claim to be in plaintiff. They admit that plaintiff has driven tunnels and drifts in said claims. They admit that the location of the Hopeful claim was made subsequent to the other two claims above named, and that plaintiff was in possession of said two claims. Defendants admit that their shaft or incline has reached very near to the tunnels, drifts, and workings of plaintiff, and that by their incline they have passed out of their side lines, and within the side lines of plaintiff's Marble Heart claim.

There was some doubt in my mind as to whether the complaint did not present such an issue as should call for the determination of the legal title to the place of the alleged trespass of defendants before the court could grant the relief asked by plaintiff, namely, a perpetual injunction restraining defendants from committing the acts complained of. There seems to be no claim on the part of the defendants but that the complaint states a sufficient cause of action. The complaint, with the admissions in the answer, probably dispenses with any such proceedings as above indicated on the part of the court. The defendants, in what they term a "cross-bill," disclose their defense, and justify their action of entering by means of an incline from the Hopeful claim into the Marble Heart claim. Although the defendants term this part of their pleadings a "cross-complaint," the court is justified in treating it as an answer, setting up new matter constituting a defense. This undoubtedly is what the pleading is. The plaintiff has so treated it by replying to it instead of answering it. In taking this position as to this pleading I am justified by the case of *Doyle v. Frank-*

lin, 40 Cal. 106. In this answer the defendants set forth that the said Drum Lummon vein or lode enters the Hopeful claim, owned by defendants, at a point near the top or apex of their claim, and passes through the same and out at the base of the triangular part of ground which defines their claim; that the apex of this vein or lode is in the Hopeful claim from the point of entrance to said base line thereof; that they commenced upon the apex of this vein with their said incline, and have followed the same down some 118 feet; that in its dip said vein passes into the Marble Heart claim. The plaintiff in its complaint avers that the apex of this lode is wholly within the Drum Lummon and Marble Heart claims. Here an issue is presented, and a material one, and must be determined by evidence, and is not a matter of law.

The plaintiff presents the point for consideration that the allegations of defendants in their answer show that the Hopeful claim has no parallel end lines. The answer of defendants does show that their claim is in the form of an isosceles triangle. A triangle has but three sides, and no two of these can be parallel to each other. The question is here presented of the right of the defendants to follow on the dip of their lead into the Marble Heart claim through its side lines. This point was settled in the case of the *Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 208. In that case the United States Supreme Court uses this language:

“Under the act of 1866 (14 St. 251), parallelism in the end lines of a surface location was not required; but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines, and extended in their own direction; that is, between parallel vertical planes. It can embrace no other.”

This language is decisive of the defendants' right to follow their vein outside of their side lines. Having no parallel end lines, they can not do it. The defendants urge that they located the Hopeful claim in such a way as to have

parallel end lines. There is nothing in the pleadings to show this, and, if there was, I do not think they could maintain this position. According to the statement made by counsel, it appears the defendants did claim a piece of ground which had parallel end lines when they made their location; but it further appears that they set their stakes upon the premises of plaintiff, and claimed some of its ground. When compelled to relinquish what they had claimed, which belonged to plaintiff, they had no north end line, and their claim assumed the form of an isosceles triangle. The defendants could locate only what was subject to location, no matter what they claimed. It was decided in *Belk v. Meagher*, 104 U. S. 279-284, that a location upon premises belonging to another person gave no rights whatever. It was only when a location was made upon the public domain that rights were acquired. But does the fact that defendants can not follow the lode out of the boundaries of their claim on its dip entitle the plaintiff to a judgment against them for so doing? Before the plaintiff would be entitled to a judgment, it must show that it is the owner of the vein upon which defendants entered its ground. The plaintiff received a grant from the United States to all lodes, the top or apex of which was within the limits of their mining claim. It did not receive a grant to any lode which had its apex or top outside of its claims. Most, if not all, patents for lode mining claims have this clause, which specifies the conditions and stipulations under which the grant is made, namely:

"*Second.* That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit."

This shows what construction has been placed upon that portion of the congressional mineral act by the land department of the United States. The interpretation placed upon a statute by the officers who have to act thereunder, and their

practice thereunder for many years, is entitled to great weight in its interpretation: *U. S. v. Moore*, 95 U. S. 760. The United States is the proprietor of all veins or lodes whose apex or top is not within the limits of any grant it has made, and this clause reserves its rights, and these rights it may grant to any citizen, or to any one who has declared his intention to become such. In the case of *Iron Silver M. Co. v. Cheesman*, 116 U. S. 533, Justice Miller, speaking for the United States Supreme Court, after quoting Section 2322 of the United States Revised Statutes, says:

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines, extended vertically, and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location."

Had the defendants so located the Hopeful claim that it would have had parallel end lines, there can be no doubt but they would have been entitled to follow any vein which may have its apex within its limits and which passed through both end lines in its strike on its dip into the Marble Heart claim. If the plaintiff would be entitled to veins or lodes whose apex is outside of the lines of their claims which enter the same on their dip, and which have not been granted by the United States to any one else, what is the extent of their right to such vein or lode? Suppose it should pass in its dip through the Marble Heart claim into adjoining ground, could plaintiff follow it beyond its lines? It is granted the right to follow beyond its lines only such veins or lodes as have their apex within the boundaries of its premises. It was urged that the plaintiff might be considered to have a grant of that portion of the vein found within the lines of its premises until the United States granted it to some one else. If the United States granted it this lode, there is no law for revoking that grant, and granting the lode or vein to another party. Such a construction of the statute would make it inconsistent with any reasonable intention on the part of Congress.

The plaintiff insists that the rule of the common law that

whoever owns the surface is entitled to all beneath the same, should apply to a case such as this. But this doctrine is not fully applicable to lode mining claims, and can not be invoked in this case at all. In this view I am supported by the opinion of Justice Beatty in the case of *Bullion M. Co. v. Cræsus M. Co.*, 5 Mng. Rep. 254. In this he says:

"The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this State. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will doubtless lead to many complications. To adhere to the common law rules upon this subject is simply impossible."

From these considerations it would appear evident that plaintiff received no grant of any lode or vein whose apex is within the surface lines of the Hopeful claim. Notwithstanding this, it is urged that, as the defendants may acquire no title to any portion of such lode as lies within the limits of the Marble Heart claim, plaintiff has a better right to the same than defendants, because such part of the vein or lode is within the lines of their claim. In the case of *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601, it was claimed that, because a vein of ore had been found by defendants (plaintiffs in error in Supreme Court) within the lines of plaintiff's placer claim, and which defendants had acquired no title to from the government of the United States, plaintiff was entitled to the same, although such vein was known to exist by the grantors of plaintiff at the time of applying for the patent for this placer claim. The plaintiff claimed that the defendants were mere intruders and strangers, and that they were in possession of the premises. But the Supreme Court said that the vein, if known to exist at time of application for a patent, was not granted to plaintiff's grantors, but excluded from their patent; and that, although defendants did not connect themselves with any government grant, the plaintiff had no right to eject them from this lode. In this case the court below refused to give, at the prayer of the defendants, this instruction:

"If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff can not recover on the weakness of defendants' title."

The Supreme Court held this was error. It would seem that such a view of the law would meet the case now under consideration. If the plaintiff received no conveyance of that portion of the Drum Lummon lode which has its apex in the Hopeful claim, then it makes no difference whether defendants have any title or not to the same, the plaintiff can not recover on the weakness of defendants' title. I have shown that the plaintiff received no grant for any lode whose apex is outside of their surface lines; that that was reserved to be granted to some one who should properly locate a piece of ground embracing this apex, whose end lines should be parallel. I do not conceive that there is any conflict between the doctrine here expressed and that set forth in *Cheesman v. Shreve*, 37 Fed. 36. The presumption may be that he who enters within the lines of another's mining claim on the surface or beneath the same is a trespasser; but where, as in this case, the fact is alleged that the defendants entered upon the Marble Heart claim by following down on its dip a vein or lode whose top or apex was without the limits of plaintiff's premises, a case is stated that shows that defendants were not trespassers upon plaintiff's premises; that they were following premises that did not belong to plaintiff.

The questions here raised being presented on a motion for a judgment on the pleadings, for the purposes of the motion the court must consider every fact set forth in the answer which is well pleaded, as true. The result I have reached under the facts as presented by the pleadings is that, while the defendants can not enjoin the plaintiff from working upon the lode or vein in dispute so far as the same lies wholly within the side lines of plaintiff's premises, the plaintiff can not enjoin defendants from working upon such portion of that vein as has its apex within the lines of the Hopeful claim, until it shows in some way that it is the owner of, or entitled to the possession of, the same. If it should be shown by the evidence

that the vein in dispute does not have its apex outside of plaintiff's premises, then there should be no dispute, but plaintiff should recover. I have considered this case upon the hypothesis that the facts set forth in the answer are substantially true. I am fully aware that the position taken in this case leaves a portion of a vein or lode in such a condition that it can not be taken up by location, under the mineral act of the United States, but this portion of the vein can not be said to belong to no one. It belongs to the Government of the United States, and, by appropriate legislation, it can provide for the sale of the same.

There is no question presented upon the pleadings as to the appropriation of any portion of this vein or lode by taking actual possession of the same. I should not dispute but that an actual possession of portions of this vein or lode will give a right to the same as against an intruder—a stranger—that is, one who could not show a prior actual possession or a grant from the United States to the same.

The motion for judgment on the pleadings is overruled.

ON THE MERITS.

KNOWLES, J.

This case has been divested of much of the difficulty presented to the mind of the court from a consideration of the pleadings. It did seem that the legal title to a portion of the Drum Lummon lode might be so involved as to require that the same should be settled in an action at law. As the case is presented by the evidence, no conflict as to title appears. It is admitted that the plaintiff owns the Drum Lummon lode claim and the Marble Heart lode claim, and that the defendants own the Hopeful lode claim; that the Drum Lummon lode or vein passed out of that claim into the Hopeful claim, and runs across the same in a southerly direction about sixty-six feet, when it enters the Marble Heart claim; that plaintiff has dug and has an undisputed title to a tunnel called the "Cruse Tunnel," which runs along the aforesaid vein or lode, and across the Drum Lummon lode claim, into the Marble Heart claim; that plaintiff is or was in the actual possession of this tunnel; that it is necessary to the working and mining of said lode or vein in

the Marble Heart claim; that by means of this tunnel plaintiff is in the actual possession of a portion of the aforesaid vein or lode, which has its top or apex in defendants' claim. It also appears that defendants are extending an incline which they started on the apex of the aforesaid lode or vein in their own ground, and were and still are threatening to extend the same down along said vein, within the side lines of the Marble Heart claim, in such a direction as to cut the aforesaid Cruse tunnel at a point where the same is wholly within that portion of the Drum Lummon lode or vein owned wholly by plaintiff; that in their operations they have already loosened the rock in the roof of said tunnel at the point where said incline, if extended, would enter the same. Although the defendants have sixty-six feet of the apex of the said lode or vein, owing to the fact that they located their claim in such a manner as to have no parallel end lines thereto, they have no legal right to follow their vein or lode beyond their side lines, never having received a grant to that portion of said lode beyond these, although owning the apex. It sufficiently appears from the evidence, if defendants are permitted to extend their incline it will wholly destroy the said Cruse tunnel for the use to which plaintiff is putting the same. The defendants do not deny that it was their purpose to extend this incline into and through this tunnel, and into the Drum Lummon vein beyond, in their search for ore; and the evidence shows that when extended beyond this tunnel, the incline will be wholly within that portion of the said vein or lode owned by plaintiff. It is true that the evidence shows that plaintiff might dig another tunnel around this incline at a cost of about \$1,000. This would be in part a new tunnel, and would be on a curve. A curved line is not as short as a straight one, and cars run upon a curved track encounter greater friction than on a straight one. The plaintiff, if compelled to abandon its old line of tunnel, would also be enforced to abandon for some distance its possession of a portion of the said vein or lode which has its apex in defendants' premises. The defendants, in extending their incline beyond the tunnel, would be within the undisputed premises of plaintiff, and would be compelled in their work-

ings to remove vein matter, and perhaps ore, from plaintiff's premises, concerning the title to which there is no dispute in this action. The defendants, as to this tunnel and the vein matter and ore beyond the same, come as strangers—trespassers. They are clothed with no right whatever to destroy plaintiff's tunnel, or to disturb its possession of any portion of said vein along the line of said tunnel. If the defendants had any legal right to explore the said vein or lode beyond said tunnel, a plea for an accommodation in this matter would come with great force. But no ground exists for such plea. It would seem that no action for damages would afford adequate relief under such circumstances. The remedy for the wrongs threatened can be awarded only in a court of equity.

For these reasons, I think the plaintiff is entitled to the relief asked. It is therefore ordered that an injunction issue restraining and enjoining the defendants from extending their incline so as to cut the tunnel of plaintiff.

1. A patent gives the right to follow the vein on the dip where the apex is within the surface lines. *Iron Silver Co. v. Cheesman*, 116 U. S. 530. See *Duggan v. Davey*, 26 N. W. 887, cited ante, p. 54.

2. Location on part of apex held to carry the dip. *Bullion Co. v. Eureka Co.*, 11 Pac. 515 (Utah). Boreman, J., dissents.

3. Where two veins unite in going down, the oldest location, not the oldest patent, takes the ground. *Champion M. Co. v. Cons. Wyoming Co.*, 16 M. R.—.

4. Dip is always at right angles to the strike. *Gilpin v. Sierra Nev. Co.*, 23 Pac. 547.

APPEAL OF ERWIN.

(12 Atlantic Reporter, 149. Supreme Court of Pennsylvania, 1887.)

¹ **Dump containing ores not demised.** The lessee of premises to work for iron ore discovered that the tailings from the washing of the ore contained ochre and other minerals of value in the manufacture of paint, and proceeded to extract and remove the same. *Held*, that he was entitled only to clean merchantable iron ore and should be enjoined from working the dump for the chrome.

Appeal from the Court of Common Pleas, Berks County.

Bill for injunction, filed by Hannah Hoch against Henry Erwin and others, to restrain them from taking and carrying away certain minerals from the complainant's land. The facts of the case appear to be as follows :

The complainant leased to one James F. Dunner, for a term of years, the exclusive right to take iron ore from certain land owned by her. The lessee was to enjoy the privilege of washing the ore on the premises, and to do all other things necessary to a successful operation of the mines, as if he owned the land. This lease passed by successive assignments to the defendant, Henry Erwin. After the mine had been operated several years, Erwin discovered that the refuse matter from the washing process, which was deposited in the slush dam, was rich in ochre and other substances used in the manufacture of paints. He proposed so to use this refuse matter, and was removing the same from the dam for that purpose when this suit was brought. It appeared that the deposit in the slush dam contained some iron, although it could not be profitably worked as an iron ore. The court below held that, considering the knowledge of the parties when they entered into the contract, the proper construction would be that by "iron ore" they meant only clean, merchantable iron ore, to be used in the manufacture of iron, and that it was not intended that anything else should be removed from the land. A decree was accordingly entered granting the injunction, and the defendant, Erwin, appeals.

¹ *Doster v. Friedensville Zinc Co.*, 21 Atl. 251.

JEFF. SNYDER and GEO. F. BAER, for appellant.

ERMENTROUT & RUHL, for appellee.

STERRETT, J.

In construing the article of agreement under which this contention has arisen and holding that under its provisions appellant, as assignee of the contract, has no right to dispose of the refuse deposited in the mud dam, we think the learned judge of the Common Pleas was clearly right, and for reasons given in his opinion, accompanying the record, the decree should be affirmed.

Decree affirmed, and appeal dismissed, at the costs of appellant.

GORDON, J., absent.

1. Contract concerning, not within statute of frauds. *Smart v. Jones*, 15 C. B. (N. S.) 717.

2. Contract as to marl dump. *Lacustrine Co. v. Lake G. Co.*, 82 N. Y. 484.

3. Dumping ground rights may be lost by a hostile adverse possession. *McLaughlin v. Del Re*, 16 Pac. 881.

4. The refuse of zinc ore mined under lease was found to have value for concrete. *Held*, that it was the property of the lessor, and the lessee was not permitted to keep it as parcel of the ore on payment of the same royalty as was due for pure ore. *Doster v. Friedensville Zinc Co.*, 21 Atl. 251.

ROSEVILLE ALTA MINING Co. ET AL.
v.
IOWA GULCH MINING Co.

(15 Colorado, 29. Supreme Court, 1890.)

A fixture may be parcel of the realty though placed on public land.

Execution. Fixtures are not liable to sale on execution as personalty.

An unpatented mining claim is real estate.

Engine house, boiler and engine placed on a mine for the permanent working of the same become fixtures and subject to the incidents of real estate.

Determined by intent. In determining whether machinery is a legal fixture the intention of the owner in its attachment is to be considered, and if it appears from the nature of the articles affixed, the purpose in view and the manner of their attachment that they were designed to be permanent, they are thereafter to be treated as parcel of the realty.

Appeal from District Court of Lake County.

Messrs. J. W. EASTON and H. P. KRELL, for appellants.

Mr. J. A. EWING, for appellee.

RICHMOND, C.

This was an action of replevin brought to recover the possession and damages for the detention of one fifteen horsepower engine and boiler, including smoke stack, rope and hoists; also one pair bellows, one truck and three buckets. The defense was that the articles above enumerated were personal property, subject to execution, and were levied upon by virtue of an execution issued in a certain cause wherein the plaintiff herein, the Iowa Gulch Mining Company, was defendant, and one William H. Baker and N. N. Robertson were plaintiffs. The validity of the judgment and subsequent proceedings are not questioned. The only point in issue in this court is whether the engine and boiler mentioned were fixtures and a part of the realty, and therefore not liable to seizure and sale under an execu-

tion as personalty. The cause was tried by the court, and it was found that the engine and the boiler were so attached to the land as to become chattels real, and not subject to levy under the execution as personal property; that appellee was entitled to their possession; that they were of the value of \$1,000; and that plaintiff had sustained damage by the loss of their use in the sum of \$475. Upon these findings judgment was rendered in the usual form.

The facts as they appear are that the appellee, the Iowa Gulch Mining Company, was in the occupation of a certain mining claim, known as the "Scooper Lode," in the California mining district, Lake County, Colorado. All of the articles levied upon were used by the company in and about the development and mining of the said claim. On the claim was constructed an engine house, shaft house or shed. Within the engine house was erected the engine, placed upon three sets of timbers laid crosswise and lengthwise, sunk in the ground, and earth tamped around them, and on these was placed a frame that the engine stood on, which was bolted down to the timbers. The boiler was set about three feet from the engine, on rock-work, and connected with the engine by the ordinary connections. The claim was upon public land. The question presented by this state of facts is whether the engine and boiler were fixtures. It is contended by appellants that there can be no such thing as a fixture upon public land. We can not agree with this position. Section 225, page 177, General Statutes, provides that "the terms 'land' and 'real estate,' as used in this chapter, shall be construed as co-extensive in meaning with the terms 'lands,' 'tenements,' and 'hereditaments,' and as embracing all mining claims, and other claims and chattels real." "Occupancy of public land possesses the legal character of real estate." This is the conclusion of this court in *Gillett v. Gaffney*, 3 Colo. 351. A title by occupation is, under our statute, an interest in real estate, and such an interest as is the subject of conveyance by deed: *Sears v. Taylor*, 4 Colo. 38. This doctrine is maintained in California: *Merritt v. Judd*, 14 Cal. 60; *McKiernan v. Hesse*, 51 Cal. 595. Our courts having recognized the interest acquired by occupancy of public land as a legal estate;

it necessarily follows that the title to or interest in the land, however defined, carries with it the title to the structure annexed to the soil. Was the property here sought to be recovered a part of the realty? In *Merritt v. Judd*, 14 Cal. 60, it was held that "an engine and pump became a part of the realty although located upon public land." The engine and pump referred to were attached to two timbers ten or twelve feet long, and from twenty to thirty inches in diameter; were placed side by side upon the ground. They were only bedded in the ground sufficiently to make them level. On these bed timbers was placed a frame of four timbers, each about eight inches in diameter, the side timbers about seven feet long and the end ones about three feet. These frame timbers were bolted or spiked together, and bolted or spiked to the bed logs. The boiler and the engine were spiked or bolted to this frame. The boiler, engine and pump were attached together by the usual connections, the pump itself extending into the shaft. Over the whole was a roof or shed, which was constructed merely for the protection or shelter of the machinery. The machinery was not attached to the building in any way except that the pump was stayed by rods reaching to the rafters of the roof. We give the full statement of facts in that case, because they seem to be analogous to the facts as they appear in the case at bar.

The court in its opinion, after carefully reviewing a number of authorities, concluded as follows: "We think that the principle to be extracted from the modern cases covers the case at bar; that this apparatus was necessary to the working of the ledge; that it was attached for that purpose permanently to the soil, and its use accessory, if not essential, to the inheritance for its only valuable purpose—the extraction of the gold." Such seems to be the situation of the property here in controversy. It must be admitted that in order to enjoy the benefits of the mining claim, to develop the mine and bring to the surface the ore, the engine and boiler here sought to be recovered were absolutely essential. Many cases can be found in the books in which a similar connection with realty made by the owner thereof has been considered a sufficient annexation: *Oves*

v. *Ogelsby*, 7 Watts, 106; *Merritt v. Judd*, *supra*, and cases cited; *Noble v. Bosworth*, 19 Pick. 314. The intention of the owner in attaching the machinery must be considered, and if it appears that he attached the property with a view that it should remain there permanently, it must be treated as real estate. This intention is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexing, and the purpose for which the annexation has been made: 1 Freem. Ex'ns, § 114; *Palmer v. Forbes*, 23 Ill. 237; *Hunt v. Bullock*, Id. 258; *Titus v. Mabee*, 25 Ill. 232. The conclusions reached by the court below are clearly sustained by the law and the evidence. The judgment should be affirmed.

PER CURIAM. *For the reasons stated in the foregoing opinion the judgment is affirmed.*

1. Removable property can not be a part of the realty when the owner does not also own the land. *Scudder v. Anderson*, 19 N. W. 775.
2. As between the landlord and tenant engine boilers and miners' cabins treated as removable trade fixtures. *Conrad v. Saginaw M. Co.*, 20 N. W. 89; 54 Mich. 249; 52 Am. Rep. 817.
3. Sale of mining machinery on leasehold ground as real estate, upheld. *Hyatt v. Vincennes Bank*, 113 U. S. 408.
4. Tenant can not remove fixtures after expiration of lease and surrender of premises. *Childs v. Hurd*, 32 W. Va. 67.

THE SUNDAY LAKE MINING Co., Respondent, v.
WAKEFIELD ET AL., Appellants.

(72 Wisconsin, 204; 89 N. W. Rep. 186. Supreme Court, 1888.)

Inequitable conduct preventing relief from forfeiture. Where an agreement is simply one for the payment of money, a forfeiture of land, chattels or money incurred by non-performance will be relieved against, unless the defaulting party by his inequitable conduct has debarred himself from such relief, or the special circumstances show that relief should not be granted.

Extension of inquiry beyond the particular covenant. Though the right of re-entry is reserved only for the breach of one covenant in a lease, branches of other covenants may be considered in determining whether relief against the forfeiture should be granted.

Above rule applied to the facts. In an action for relief against the forfeiture of a mining lease for non-payment of rent, the answer alleged that the lessees had failed to furnish monthly statements of the ore mined, as required by the lease; that they had committed waste; that they were insolvent; and that the property was in danger of being dismembered or destroyed by the creditors and unpaid workmen for the purpose of securing their debts. *Held*, on demurrer, that all these matters were proper to be considered in determining whether relief should be granted.

Jurisdiction over lease beyond the State. Courts of this State, having jurisdiction of the parties, can relieve against the forfeiture of a lease of mining property in another State for non-payment of rent, although they can not restore the property to the possession of the lessee.

Appeal from Circuit Court, Milwaukee County.

D. H. JOHNSON, J.

VAN DYKE & VAN DYKE, for appellants.

TURNER & TIMLIN, for respondents.

COLE, C. J.

The demurrer to the answer, though special in form, must be treated as a general demurrer. It is conceded that it reaches back to the complaint, and raises the question as to

its sufficiency as a pleading. This is evidently the view of its effect taken by the court below, for the order appealed from states that the complaint is held sufficient, but the demurrer is sustained as to that part of the answer following the general denial and preceding the last separate defense therein pleaded. The action is brought to obtain relief from the forfeiture of a mining lease, upon default in the payment of the rent reserved by the lease at the times specified. The default is admitted in the complaint. But as a ground for equitable relief from the forfeiture it is alleged that the plaintiff company entered into possession of the premises under the lease for the purpose of mining iron ore; sunk shafts; made excavations at great expense; erected sheds, buildings, tramways, supports, hoisting apparatus, and other improvements and machinery necessary and convenient in operating a mine; and developed a valuable mine at great expense, in such manner that the improvements, engines, and machinery placed upon the premises, exclusive of the mine, were of the value of \$20,000; that the value of the leasehold interest in the premises, exclusive of the improvements, is upward of \$200,000; that the stock of the corporation is widely distributed among more than 150 stockholders in different States.

The complaint further alleges payment of rent, and performance of all the covenants of the lease except the payment of the rent for the months of August, September, October and November, 1887; admits failure to furnish the monthly sworn statements for these months of the iron ore removed, as required by the lease, but states that before the defendants entered into possession a tender was made of all rent due and in arrears, and offers to furnish the sworn statement of all ores mined or removed from the premises during the months it was in default. These are the material allegations upon which the equities of the plaintiff to be relieved from the forfeiture incurred by failure to pay the rent when due must rest. If these were all the facts to be considered, it well might be held that they present a case for the interference of a court of equity to aid the plaintiff by relieving it from the forfeiture and setting it aside.

The doctrine seems to be quite well settled that where the agreement is simply one for the payment of money,

and the forfeiture of either land or chattels or money is incurred by non-performance, the forfeiture will be relieved against, unless the defaulting party, by his inequitable conduct, has debarred himself from such relief, or the special circumstances show that the relief should not be granted. See cases cited in the note to *Smith v. Mariner*, 68 Amer. Dec. 85. Says a learned author: "Where the lease contains a condition that the lessor may re-enter—as the lease before us does—and put an end to the lessee's estate, or even that the lease shall be void upon the lessee's failure to pay the rent at the time specified, a court of equity will relieve the lessee, and set aside the forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant." 1 Pom. Eq. Jur. § 453, and authorities cited in the note. It would seem eminently just to enforce this doctrine in view of the provision in the Michigan statute which gives the tenant in default for non-payment of rent an opportunity to pay the same, and retain possession, after a judgment of restitution has been rendered in favor of the landlord; the same as the statute of this State: 2 How. Ann. St. Mich., Sec. 8308; and Sec. 3371, Rev. St. Wis.

But it is claimed the matters set up in the answer show that the plaintiff should not be relieved against the forfeiture incurred. It is alleged, in effect, that the plaintiff failed to perform other covenants in the lease than that in respect to the payment of the rent; that it neglected to make the monthly statements of the ore mined and removed from the premises during the months of September and October, 1887, although demanded; that in the month of August, 1887, it became insolvent, and continues so, unable to pay the wages of the miners and workmen employed about the mine; that on the re-entry of the defendants upon the demised premises, these wages remained unpaid, and the workmen threatened and were about to stop the pumps of the mine and flood it, and do other great and irreparable damage to the mine and improvements; that one of the defendants, on behalf of himself and the other owners of the mine, was obliged to guaranty a large amount of the claims of the unpaid workmen, and has purchased such claims to the amount of \$7,000; that in the month of

November, 1887, prior to the time of the defendants' re-entry, a large number of attachments had been issued out of the Circuit Court of Gogebic County and other courts in the State of Michigan, in actions therein pending against the plaintiff, and had been levied, together with executions, upon the improvements and property of the plaintiff at said mine, some of which, as between the plaintiff and defendants, as they are advised, would be deemed fixtures and appurtenant to the mine; and that by said levy and sale and removal thereunder of such improvements and fixtures the rights and interests of the defendants in the demised premises were greatly jeopardized and impaired. It is further charged that the plaintiff cut timber, or permitted it to be cut, on the premises, contrary to the terms of the lease, and committed waste thereon; that on the 5th of November, 1887, the plaintiff remaining wholly insolvent, and the rent remaining unpaid, and the written statements of the amount of ore mined and removed during the months of August, September and October not having been furnished, and the demised premises being threatened with great and irreparable injury by the unpaid miners and workmen, and by attaching and execution creditors of the plaintiff seeking to dismember said mining property, the defendants served notice demanding the immediate possession of the demised premises, and subsequently obtained possession of the same.

Should the evidence sustain these allegations of the answer, it is very doubtful whether equity would relieve against the forfeiture; for, if the plaintiff has broken other covenants besides the one for rent; has committed waste on the premises by cutting timber which it had no right to cut; if it is insolvent, or so pecuniarily embarrassed that it could not raise means to operate the mine, pay its workmen, or protect the property from being dismembered or jeopardized by the claims of its creditors—would it be equitable to remove the forfeiture, and restore the lease? It is plain that to do so would endanger the collection of the rent and the mining property. If the plaintiff is insolvent, what security have the defendants that the rent will be paid in future, or that the property will be protected against waste and destruction? Surely their rights will be endangered, if these facts are true

by restoring the plaintiff to the possession of the property; certainly, unless security is required for the performance of the covenants of the lease. The principle is laid down in some of the cases that where other covenants have been broken besides the one for rent, and against which no relief can be given in equity, a forfeiture for breach of the condition concerning rent will not in such case be relieved against, as such relief would be of no effect: *Nokes v. Gibbon*, 3 Drew. 693; *Bowser v. Colby*, 1 Hare, 109; *Home v. Thompson*, Sausse & S. 615.

As observed by appellant's counsel, embarrassments or insolvency materially affect the ability of the plaintiff not only to pay the rent, but to perform other covenants of the lease. While it may be true that the right of re-entry does not extend to all breaches of the covenants, yet the court can properly consider them when asked to grant relief. "A court of equity, when asked by a lessee to grant him relief, will consider the conduct of the lessee in dealing with the property, whether that conduct does or not involve a breach of covenant:" *Bowser v. Colby*, *supra*. It was clearly the intention of the parties that the mine should be effectually worked during the term, and, to secure this end, the clause is added that the lessee shall mine at least 10,000 gross tons each and every year after January, 1884, and, in case that quantity is not mined, the lessee agrees to pay the rent or royalty on that amount. Of course, it is the duty of a court of equity to see that no injustice is done to the landlord by its decree; and it would be most inequitable, as it appears to us, to restore the plaintiff to its former position, if the matters stated in the answer are true, without some security that the landlord's rights will not be prejudiced, and that the lessee will perform the covenants of the lease. Assume that the forfeiture for the non-payment of rent should be relieved against, still there is the neglect to furnish the sworn statements of the quantity of ore removed on the first Monday of each month; and this default seems to be without any justifiable excuse. The lease, as modified, is so very plain upon that point, that there is no reasonable ground for mistake in the matter. There is also the charge that timber was cut on the premises, which was not necessary for mining operations, nor authorized by the

lease; that the property is in danger of being dismembered or destroyed by the creditors or workmen of the plaintiff for the purpose of securing their debts; that the plaintiff is wholly insolvent. All these matters are proper to be considered by a court of equity before granting relief from the forfeiture.

We shall not consider the other matters stated in the answer by way of defense to the relief asked, as that the plaintiff company failed to comply with the laws of this State in not having its capital stock subscribed and paid in; nor whether it complied with the laws of Michigan relating to mining corporations. As at present advised, we see nothing in these facts, even if true, which should prevent equity from removing the forfeiture, if otherwise it would be equitable to do so.

As to the question of jurisdiction it is apparent that the courts of this State could not, in any event, restore the plaintiff to the possession of the mining property which is in Michigan. The plaintiff would have to apply to the courts of that State for that relief. But there is no doubt but that the courts of this State, having jurisdiction of the parties, could remove the forfeiture for non-payment of rent. In doing this, it would be acting upon the parties, and could enforce that relief.

BY THE COURT. *The order of the Circuit Court sustaining the demurrer to the answer is reversed, and the cause remanded for further proceedings according to law.*

1. Construction of covenant to pay royalty quarterly and to raise a certain quantity of ochre each year, with relation to time when forfeiture could be declared. *Hoch v. Bass*, 126 Pennsylvania St. 13.

2. After a heavy expenditure running through years, active operation ceased, but the mine was not abandoned: *Held*, that in the absence of a stipulation for continuous working no forfeiture would be declared upon such state of facts. *Benavides v. Hunt*, 15 S. W. 396.

3. Court of equity will not enforce a forfeiture in favor of a party out of possession. *Grummet v. Gingrass*, 77 Mich. 369.

4. Where a lease providing for forfeiture on short suspension of work has been a long time idle, the burden of proof is on the lessee to prove the lessor's consent to re-enter. *Wesling v. Kroll*, 47 N. W. 943.

5. Where lessors after a forfeiture accrues permit lessee to proceed and expend large sums of money they waive their right to perfect a forfeiture upon the original breach. *Benavides v. Hunt*, 15 S. W. 396.

CHATHAM FURNACE CO. V. LAWRENCE MOFFATT.

(147 Massachusetts 408; 18 N. E. Rep. 168; 9 Amer. St. Rep. 727. Supreme Judicial Court, 1888.)

¹ **Asserted knowledge.** The charge of fraudulent intent is maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive.

² **The fraud exists in stating that the party knows the thing to exist** when he does not know it to exist, and if he does not know it to exist, he must ordinarily be deemed to know that he does not.

Misstating quantity of ore. An action for deceit will lie by the vendee against the vendor of a mineral lease, for misrepresenting the quantity of ore in the lease, and thus inducing the vendee to purchase, although the vendor did not know his statements were false, but did know that their truth depended on the accuracy of a survey one line of which he knew to be assumed, and which proved erroneous.

Grounds of decision not material. Where it does not fully appear, from the decision of a court trying a case in lieu of a jury, what considerations entered into the amount of damages allowed, and no requests for rulings or findings were made, the general rule adopted by the trial court not being questioned, the judgment will not be disturbed.

Exceptions from Superior Court, Berkshire County. **BARKER, J.**

Action by the Chatham Furnace Company against Moffatt, for tortuous misrepresentations inducing the purchase of a mine. Judgment for plaintiff, and defendant brings exceptions.

T. P. PINGREE and H. L. DAWES, for plaintiff.

M. WILLOX and E. M. WOOD, for defendant.

C. ALLEN, J.

It is well settled in this commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made as of the party's own knowl-

¹ *Sears v. Hicklin*, 18 Colo. 143; *Lahay v. City Nat. Bank*, 15 Id. 339.

² *Sellar v. Clelland*, 2 Colo. 532; *Stimson v. Helps*, 9 Id. 83.

edge, which is false; provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this commonwealth, and rests alike on sound policy and on sound legal principles: *Cole v. Cassidy*, 138 Mass. 437; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Milliken v. Thorndike*, 103 Mass. 382; *Fisher v. Mellen*, Id. 503; *Stone v. Denny*, 4 Metc. 151; *Page v. Bent*, 2 Metc. 371; *Hazard v. Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, among others: *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360; *Bower v. Fenn*, 90 Pa. St. 359; *Brownlie v. Campbell*, L. R. 5 App. 953, by Lord BLACKBURN; *Reese River M. Co. v. Smith*, L. R. 4 H. L. 79, 80, by Lord CAIRNS; *Slim v. Croucher*, 1 De Gex, F. & J. 518, by Lord CAMPBELL.¹

In the present case, the defendant held a lease of land in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and *debris*. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore-bed, uncovered, and ready to be taken out, and visible when the bed was free from water and *debris*. The material point was whether this mass of iron ore, which did in truth exist underground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was that this was in his ore-bed; and the representations were not in

¹ See also *Peek v. Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

fact true in this: that while, in a mine connecting with defendant's shafts, there was ore sufficient in quantity and location, relative to drifts, to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine, and the defendant's mine was in fact worked out.

During the negotiations the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but, in consequence of this erroneous assumption, the survey was misleading—the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff.

The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore-bed—that is, within his boundaries; and, in support of this assertion, he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now, this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If, under such circumstances, he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore-bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation

was sustained, although he believed his statement to be true. The case of *Milliken v. Thorndike*, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans; and, in reply to a question if the drains were where they were to be according to the plans, said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice Colt, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff [the lessor] had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."

In respect to the rule of damages, the defendant does not in argument contend that the general rule adopted by the judge was incorrect, but that it does not sufficiently appear what considerations entered into his estimate. No requests for rulings upon this subject were made, and there was no error in the course pursued by the judge.

Exceptions overruled.

1. Duty of party to inform surety as to the insolvency or previous default of the party whose conduct or personal and pecuniary responsibility is to be endorsed. *Bank of Monroe v. Anderson Co.*, 22 N. W. 929; *Guardian Ass. Co. v. Thompson*, 9 Pac. 1; *Smith v. Josselyn*, 40 Oh. St. 409.

2. Rescission of stock sale for false representation that mine had been examined by vendee's agent. *Booth v. Smith*, 117 Ill. 370.

3. Defendant gave a note to the managing director of a corporation in exchange for the personal note of such director to aid a private deal. The mining director absconded with funds to the amount of the note: Held, that defendant was liable on the note to the corporation. *Société des Mines v. Mackintosh*, 18 Pac. 363.

4. Fraud need not be proved to exclusion of any other reasonable hypothesis. *Adams v. Thornton*, 78 Ala. 489; 56 Amer. Rep. 49.

5. Statements of ability to work on a large scale, if false, will allow of rescission. *Rorer I. Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285.

6. Non-performance of a promise is not fraud. *Adams v. Schiffer*, 11 Colo. 15. But the making of a promise with no intention to perform may amount to a fraud and justify rescission. *Lawrence v. Gayetty*, 78 Cal. 126.

7. The act of a bank in buying up a claim against a depositor and refusing to honor his checks on account thereof is a duress which will avoid a settlement made between them enforced by this duress. *Adams v. Schiffer*, 11 Colo. 15.

8. When a creditor holding a mine in trust to pay a debt sold the same to an innocent purchaser: *Held*, liable to the owner with compound interest. *Adams v. Lambard*, 22 Pac. 180.

9. Effect of request by defendant to plaintiff to send him a bogus contract. *Caldwell v. Willey*, 26 Pac. 162.

10. Analysis of facts of an alleged fraudulent sale and holding the same to make no case. *Synnott v. Shaughnessy*, 180 U. S. 572.

PHILLIP GARMAN v. JOSEPH D. POTTS.

(185 Pennsylvania State, 506; 19 Atl. Rep. 1071. Supreme Court, 1890.)

¹Advantageously mined. When a mine is let at a royalty, a certain number of tons to be got annually "provided the ore can be advantageously mined," the lessee is not obliged to get such product when the ore at the pit's mouth is worth less than the cost of winning it. Such clause is for the protection of the lessee and means "beneficially to him."

Evidence on such clause. In an action for rent under such lease, the lessee may prove that the ore could not be mined advantageously, why it could not be done, the cost of mining and putting the ore on the bank, and that when so placed it was not merchantable.

²Receipts affecting terms of contract. Under a lease providing for the winning of a minimum number of tons per annum under certain conditions, lessee for several years paid royalty to the amount of such minimum but in excess of the ore actually won, taking receipts that such excess should be credited on future settlements. Such receipts on suit for ore taken in later years were admissible as credits and were not to be excluded on pretense that they were explained to lessor "as simple receipts" without any intimation "that they changed the lease."

Appeal from Court of Common Pleas, Lancaster County.
J. B. LIVINGSTON, J.

Assumpsit by Philip Garman against Joseph D. Potts. On September 25, 1872, plaintiff leased to Levi B. Smith & Co. the right to mine iron ore on his farm for a period of twenty-one years upon the following conditions, viz.:

"The party of the second part, for themselves, their heirs and assigns, agree to pay to the said party of the first part, his heirs or assigns, forty cents per gross ton on all iron ore by them mined and carried away from the said premises. The parties of the second part also agree to mine the iron ore at the rate of fifteen hundred tons per annum on an average, provided the iron ore can be advantageously mined, and as much more as they may see fit to mine; and any excess of fifteen hundred tons of iron ore mined and carried away from the said premises in any one year, and paid for, shall go as a credit on the iron ore to be mined in future years.

¹ *Krum v. Mersher*, 9 Atl. 834; *Muhlenberg v. Henning*, Id. 144.

² *Jenkins v. Clyde C. Co.*, 48 N. W. 970; *Washington Co. v. Johnson*, 16 Atl. 799; 16 M. R.—

All settlements for iron ore mined and carried away from the within mentioned premises shall be made annually, and paid for in full on or before the first day of April each and every year."

Levi B. Smith & Co. took possession under this lease, and held the same until March 20, 1880, when they sold it to defendant. During the entire time the Smiths held the lease, including April 1, 1880, they paid the minimum rental on 1,500 tons at 40 cents per ton, or \$600 per annum, regularly on the 1st day of April in each year. Defendant took possession April 1, 1880, and paid the same minimum rental regularly on the 1st day of April, 1881, 1882, and 1883. This action was brought to recover the rent for the time from April 1, 1883, to April 1, 1888. Defendant obtained judgment. Plaintiff appeals, and assigns the following specifications of error:

"(1) The court erred in allowing Joseph D. Potts to testify: 'Question. Then you did not use much of it? Answer. Not to any extent until after we stopped mining. We tried to sell it, but we could not use it. * * * Q. I wish you would state why it can not be advantageously mined. (Objected to by the plaintiff unless the witness confine his answer to physical difficulties or obstacles presenting themselves as a hindrance to advantageous mining. Allowed and plaintiff excepts.)' (2) The court erred in allowing Joseph D. Potts to testify as to the cost of mining ore, and in not confining him to 'whether it cost more now than when he commenced mining,' viz.: 'Q. What will it cost per ton to take this iron ore out, and put it on the bank at the Philip Garman mines? (Objected to by counsel for the plaintiff. By the court: As they are going to explain by this witness whether or not this ore could be advantageously mined without stating what it cost to mine it, they can ask him now, if they wish, whether it costs more now than it did when he commenced mining. I think this question would be a proper one. Question admitted. Plaintiff excepts.) Q. Be kind enough to tell us how much money it cost to take the ore out and put it on the bank at the Philip Garman mines? A. Between \$2.80 and \$2.90 is the cost to take it out and put it on the bank.' (3) The

court erred in allowing Joseph D. Potts to testify: 'Q. How far is your furnace from the mines? (Objected to by Mr. Beyer, counsel for plaintiff. There is nothing in the lease that says where it is, or that the ore mined is to be hauled there. Question allowed. Plaintiff excepts.) Q. How far is it from the Philip Garman mines to your furnace? A. It is something like eight miles by ordinary road.' (4) The court erred in allowing Horace L. Haldeman to testify as to quality of the ore now at the mine without reference to, and without knowledge of, its quality at the making of the lease; he never having seen the mine till 1888: 'Q. What do you say as to the quality of the ore? (Mr. Beyer: We object to anything that has to do with the quality of the ore. Question admitted. Plaintiff excepts.) Q. Do you call this good, merchantable iron? A. I do not. (Question and answer objected to by the plaintiff. Allowed, and plaintiff excepts.)' (5) The court erred in its construction of the phrase 'can be advantageously mined,' in saying to the jury: 'What does it mean? The word "advantageously," lexicographers tell us, means beneficial, profitable, convenient, and gainful, when the word is used in cases like the present. Upon looking at the whole matter carefully, we find the proviso should be so construed as to read, "provided the iron ore can be beneficially, conveniently, profitably, and gainfully mined," making the covenant read as follows: "The parties of the second part also agree to mine the iron ore at the rate of fifteen hundred tons per annum on an average, provided the said ore can be advantageously mined, conveniently, profitably, and gainfully mined, and as much more as they see fit to mine."' * * * (8) The court below erred in its answer to defendant's second point, viz.: 'Under the terms of the lease given in evidence, the defendant was not liable for any rent or royalty unless the ore would have been worth when mined at least as much as it cost to mine it.' Answer to defendant's second point: 'We affirm this point, for the defendant would not be liable for any royalty under the terms of the lease unless the iron ore could be advantageously mined.' * * * (10) The court erred in admitting the parol state-

ments of March 31, 1880; April 4, 1881; March 29, 1882 and April 2, 1883, so far as they contradict the lease, without proof of consideration. All are in same form, viz.:

“‘Jos. D. POTTS, WILLIAM M. POTTS, FRANK W. IREDELL,
Proprietor. Manager. Mining Engineer.

“‘GARMAN MINES.

“‘BAENESTON P. O., Chester Co., Pa.,

“‘April 4th, 1881.

“‘Philip Garman, in account with Jos. D. Potts, for settlement of royalty account on the iron-ore lease given by him to Levi B. Smith & Co., subsequently owned by the said Jos. D. Potts:

Dr.

To balance due on royalty account April 1st,	
1880.....	\$3,527 04
Cash advanced as per receipt below April 4th,	
1881.....	600 00
	<hr/>
	\$4,127 04

Cr.

By royalty on 870 1350-2000 tons ore, @ 40 cents,	
hailed to date.....	348 27

Leaving balance advanced to date.....	\$3,778 77
---------------------------------------	------------

“‘\$600. Received April 5th, 1881, six hundred dollars on above account, the same making, with previous advances, a total of three thousand seven hundred and seventy-eight dollars and seventy-seven cents advanced on royalty account to date. This sum is to be applied in further settlement of royalty on ore to be mined and carried away hereafter by the said Jos. D. Potts, according to the terms of the afore mentioned lease.

“‘PHILIP GARMAN.’”

WM. D. WEAVER and W. F. BEYER, for appellant.

JOHN J. PINKERTON and H. M. NORTH, for appellee.

PAXSON, C. J.

The clause in the lease which gives rise to the present contention is as follows: "The parties of the second part agree to mine the iron ore at the rate of fifteen hundred tons per annum on an average, provided the iron ore can be advantageously mined, and as much more as they see fit to mine."

As the lease was in writing, its proper construction was for the court. The contention arises upon the words "advantageously mined." This language is peculiar, and was evidently intended for the benefit of the lessees. The plaintiff contends that its only effect is to relieve the lessees from hidden defects in the mine, such as a fault, or some physical difficulty in getting out the ore, not contemplated by the parties, but which is liable to exist in any mine. The court below gave the language in question a broader construction, and held that it meant that the defendant was not liable under the lease unless the ore could be "advantageously—that is, beneficially, conveniently, profitably, and gainfully—mined" (see fifth assignment); and further instructed the jury that "under the terms of the lease given in evidence, the defendant was not liable for any rent or royalty unless the ore would have been worth when mined as much as it cost to mine it" (see eighth assignment).

We are unable to see any error in this instruction. The court below gave to the word "advantageously" its common and popular meaning. It is not a technical word or term of art, and the parties must be presumed to have used it in its known sense. As before observed, it was for the relief of the lessees. Hence, if the mining was no longer advantageous to them, they had a right to cease their operations. After defining, as we think properly, the meaning of the word, the court submitted to the jury the question whether the defendant could further work the mine to advantage, and they found specially that he could not. This settles the question of fact adversely to the plaintiff. It is to be observed that the cost of getting the ore to the market was not allowed to enter into the case. It was only the cost of the ore at the mouth of the mine that went to the jury. Surely, if it was not worth as much there as it cost to mine it, the defendant could not mine it advantageously to himself, however beneficial it might be

to the plaintiff. We must take this contract as the parties have made it. They might have stipulated for a different rule. It is our duty to construe the lease according to its plain meaning.

There are several other assignments, but the two referred to raise the pivotal question in the case. We find no error in the admission of the testimony referred to in the first four assignments. Under the construction we have placed upon the lease, it was not error to allow the defendant to prove that the ore could not be mined advantageously, why it could not be done, the cost of mining and putting the ore on the bank, and that, when it was so placed, it was not merchantable. Nor was it error to admit in evidence the papers referred to in the tenth assignment. The object was to prove that, in any view of the case, there was no royalty due under the lease. Upon this ground alone the defendant was entitled to a verdict. The remaining assignments do not require discussion. A careful examination of them discloses no error.

Judgment affirmed.

1. Lessee of water not estopped to deny title. *Swift v. Goodrich*, 11 Pac. 561; 70 Cal. 103.

2. Construction of clauses for minimum rent. *Bamford v. Lehigh Zinc Co.*, 33 Fed. 677; *McIntyre v. McIntyre C. Co.*, 11 N. E. 645.

3. Absence of ore no defense to minimum rent. *Id.* Covenant to take out certain amount of ore is absolute. *Flynn v. White Breast Co.*, 32 N. W. 471.

4. Bond and lease—when option exercised and royalty ceases. *Flynn v. White Breast C. Co.*, 32 N. W. 471.

5. Lessee not entitled to new minerals not mentioned in lease. *Erwin's App.* 16 M. R. 91.

6. Grant of right to mine for twenty years passes only a leasehold estate. *McElwaine v. Brown*, 11 Atl. 453.

7. Covenant to work continuously not implied. *McIntyre v. McIntyre C. Co.*, 11 N. E. 645.

8. Agreement to pay royalty if ore found of certain value—question of what proof admissible; and time limit held not conclusive. *McCahan v. Wharton*, 16 M. R.

9. Royalty on mine worked by receiver is a first charge. *Allison v. Coal Creek Co.*, 9 S. W. 226.

10. Lessees may remove fixtures after forfeiture for non-payment of royalty. *Mickle v. Douglass*, 39 N. W. 198.

11. Lease construed as sale. *Del. R. R. v. Sanderson*, 109 Pa. St. 588; 58 Am. Rep. 743.

12. Lessees have no right to work or not as they see fit. There is implied covenant to work when the only rent is royalty. *Rorer I. Co. v. Trout*, 5 Am. St. Rep. 285; 83 Va. 397.

13. Deeds and leases. Construction as to whether plaintiff entitled to royalty on all or on a fraction. *Rucker v. Wheeler*, 127 U. S. 85.

14. Contract by lessee to deliver so much ore or let lessor re-enter—controversy as to payments induced failure. Lessee restored to possession. *Foster v. Hecksher*, 42 N. J. Eq. 254.

15. Lessee can not recover against trespassers the value of stone taken by them during the term. *Baker v. Hart*, 123 N. Y. 470; reversing S. C. 5 N. Y. Sup. 845.

16. A co-lessee can transfer or assign his own interest only. *Meagher v. Reed*, 24 Pac. 681.

17. Construction of lease of contiguous tracts as to what constituted the "mine" demised. *Pierce v. Tidwell*, 2 So. 15.

18. A contract to work a mine and receive as compensation eighty per cent of the ore, held to be a lease. *Pelton v. Minah M. Co.*, 28 Pac. 310.

19. The lessee having the right to quit on it becoming impracticable to mine more coal, gave notice that he would "surrender as provided for in the lease." Held, that the notice implied a quitting for the cause allowed in the lease. *Jenkins v. Clyde Coal Co.*, 48 N. W. 970.

20. Where a lessor signed receipt reciting that the lease was surrendered, and that the payment was in full of all claims—such receipt is admissible without pleading, shows the termination of the lease, and the landlord can not escape its effects on the allegation of having signed it without reading. *Id.*

21. Construction of grant of coal and surface rights holding that the grantee could mine coal under adjoining lands, dump slack from the adjoining mines on the demised surface and drain the adjoining ground through the demised land. *Genet v. Delaware Canal Co.*, 123 N. Y. 505.

22. Where a lease provided for a forfeiture on failure to work three weeks, and there was suspension of work for several months, after which work was resumed, the question whether the lessor consented to the resumption of work is for the jury. *Westing v. Kroll*, 47 N. W. 943.

23. A coal lease provided lessee should pay so much per ton on the first days of January and July of each year. Held, that the words naming the dates of payments merely fixed dates for settlement and did not bind the lessees absolutely to commence mining before a reasonable time. *King v. Edwards*, 82 Ill. App. 558.

24. The assignee of oil lease agreed to pay his assignor so much when oil was found in paying quantities. Held, that this did not prevent the assignee from surrendering and taking new leases from the owner, but did not release him from payment if, by any person, oil should be struck during the term of the original leases. *Smith v. Munhall*, 21 Atl. 735.

25. Delay to tender lease under contract may justify lessee in refusing to accept when offered. *Kille v. Reading Iron Works*, 21 Atl. 666.

26. Where the royalty is based on stone shipped the lessor can not

recover for rock quarried but not shipped. *Crawford v. Oman Stone Co.*, 12 S. E. 929.

27. The term "dimension stone" in a quarry lease between parties who were experienced quarrymen must be taken as used in its technical sense. *Id.*

28. A lessee agreed to commence to bore for gas within a year and to pay an annual rent for all land occupied. But beginning to bore on ground in same region leased from others, was to be considered as compliance with his agreement to bore within a year. He did start his well on the other leases. *Held*, that he was not liable for the first year's rent, nor at all till he occupied or began to work on the lessors' land. *Richardson v. Downs*, 16 S. W. 84.

29. Allowing the mine to remain flooded is breach of covenant to mine in workmanlike manner. *Cons. Coal Co. v. Schaefer*, 25 N. E. 788.

other metals; and the said Fishers, etc., agree not to use said land for any other purpose than searching and working for gold, etc., and that they will not molest or disturb the said Bowles in farming upon said land, except so far as may be necessary for carrying on mining operations; and the said Bowles, Fisher, etc., each binds themselves, their heirs, etc., in the penalty of five thousand dollars, for the true performance of the above on each of their parts. In witness whereof the parties of these presents have set their hands and affixed their seals the day and date above written.

"D. W. K. BOWLES. [Seal.] BUFORD KIRTLEY. [Seal.]

"GEO. FISHER, SR. [Seal.] GEORGE FISHER, JR. [Seal.]

"DUNLOP FISHER. [Seal.] JAMES FISHER. [Seal.]"

On the 7th day of March, 1836, Buford Kirtley, one of the grantees in the deed from said Bowles, conveyed his interest, rights and title in and to "a certain *lease*, made and entered into 7th day of August, 1834, between D. W. K. Bowles, George Fisher, Sr., George Fisher, Jr., James Fisher, Dunlop Fisher, and Buford Kirtley, * * * for the purpose of searching and working for gold, and other metals," etc., to Joseph Hodgson. Shortly after the making of the lease, on the 7th of August, 1834, between D. W. K. Bowles and the Fishers and Kirtley, they commenced exploring and operating upon the land of Bowles (he being one of the company or partnership), which they continued for some time, and then they quit their work and searching upon the place wholly and finally; when Bowles, being disgusted and worn out about their abandonment of the undertaking, stipulated for, repurchased, and had conveyed back to him, by deed dated 4th day of January, 1842, from the said Fishers, the interest or privilege which he had conveyed to them by the deed of 7th of August, 1834. Bowles considering the agreement between him and the Fishers and Kirtley to be wholly at an end, both by this retransfer, and by their total abandonment of the operations of searching and working for gold and other metals, for many years went on persistently, and at great expense, from 1842 to 1884, delving and working and sinking shafts, and making developments, in pursuit of his monomania, and his oft-repeated declaration, that "the way to sell a gold mine was to operate it."

But in all this forty years and more, during which Bowles was devoting most of his time and means—even his salary as county judge—to making these explorations and developments upon his land, for gold and other minerals supposed to be there, singly and alone, Hodgson, from the day of the assignment made by Kirtley to him, March 7, 1836, down to the filing of the petition in 1885, never did any work, or made any searching or digging, on the land, or took any part or even possession, for any purpose, or ever contributed a cent, or took any notice or gave any attention to his asserted interest acquired nearly fifty years before, until the land is sold under the decree of the Circuit Court of Fluvanna in this creditors' suit in which the appellant filed his petition. Indeed, so completely had the whole thing been abandoned that the said deed of assignment from Kirtley to Hodgson of March 7, 1836, was never even put to record until May 22, 1880, after which the appellant filed his petition setting up his claim to a participation in the proceeds of the sale of Bowles' land at the suit of his creditors. Upon the hearing of the cause, at the April term, 1887, the Circuit Court dismissed appellant's said petition, from which action of the court this appeal is taken.

The determination of this case, in this court, is ruled by the decision in the case of *Barksdale v. Hairston*, 81 Va. 764, in which LACY, J., delivering the opinion of the court, said: "The provision in the agreement of the 10th day of November, 1836, between John A. Hairston, Peter Hairston, and George Hairston, that the partnership should have and possess the exclusive use and privilege of digging, hauling off, and working any ore now found, or which may hereafter be found, anywhere on the said John A. Hairston's land, was the grant of a mere license to the partnership to dig ore on the said premises, not coupled with any estate or interest in the said lands, and did not create any easement on the land. No acts having been done under the license, the same was an executory license; was revocable at the pleasure of the grantor, and so continued up to the dissolution of the partnership by the death of one of the partners. In 1842 the lands belonging to the partnership were sold and conveyed in a suit brought to wind up the partnership.

The license, never exercised, was not assignable, and was revoked by the dissolution of the partnership, and does not attach to or affect the lands in the hands of John A. Hairston's heirs, or their vendee." See, also, the long list of cases cited as authorities by the learned judge above quoted.

The deed of August 7, 1834, between Bowles of the one part, and the Fishers and Kirtley of the other part, was simply a lease, to the said Fishers and Kirtley, of the privilege of searching and digging and working for gold or other minerals upon Bowles' land, which was to continue "as long as they may deem it worthy of searching and working for gold and other metals," and they had no power conferred to sell or to assign their contract, either as to their "privilege," or as to their covenant obligations, for the faithful performance of which, on their part, they expressly covenanted in a penalty of \$5,000. They were skilled and experienced miners, and their personal skill was contracted for. They were only required to continue their operations under the lease so long as they might deem it worth while to do so; and as soon as they should find it "unworthy" or unproductive they were at liberty to stop and abandon the enterprise; and this Kirtley did do, and abandoned the partnership, and dissolved it as to him, on the 7th of March, 1836; and the Fishers did likewise, as to them, by their retransfer to Bowles on the 4th January, 1842, and the absolute and total non-action and abandonment of the undertaking from 1842 to this day. The deed from Kirtley to Hodgson, 7th of March, 1836, amounted to nothing, and conferred no right whatever, such license not being assignable: 2 Minor, Inst. p. 22, 6 (h); *Barksdale v. Hairston*, 81 Va., *supra*. But even if his said assignment could have been valid, and operative, he did not and could not confer upon his alienee, Hodgson, anything more or other than his own limited and conditional rights and obligations under the contract with Bowles. The whole conduct of the parties, both Col. Bowles and Mr. Hodgson, from 1836 to 1880, shows a complete abandonment of the contract of 7th of August, 1834, and that for over fifty years Col. Bowles was in full, complete, and uninterrupted adverse possession of the land and minerals, incurring heavy expenses in money, and unin-

permitting search and labor, to develop the supposed mineral value of the land, in entire good faith, and full persuasion that he was the rightful and sole owner thereof.

Even on the contention of the appellant that the assignment of Kirtley, March 7, 1836, to Joseph Hodgson, was valid, and operated to vest an interest in said Hodgson in the "privilege," Hodgson could only claim the settlement of an account between him and Bowles, in which he would have to be charged with the performance of his assignor's covenant contract, and with a contributive share in the expenses and outlay of Bowles for over forty years, which would bring Hodgson largely in debt to Bowles; but the transactions to be inquired of, in any such attempted ascertainment, cover a period of over fifty-three years, and the parties concerned in them are all dead, except Mr. Hodgson, and so of all the witnesses. No accounts appear to have been kept, and no papers of any sort have been filed, or are alleged to be in existence; and a court of equity can not be invoked to the worse than idle and impossible attempt to approximate a correct result of any such account, even though the appellant had any equity to ask for it. See *Harrison v. Gibson*, 23 Grat. 223; *Stamper's Adm'r v. Garnett*, 31 Grat. 550; *Justis v. English*, 30 Grat. 576; *Crawford's Ex'r v. Patterson*, 11 Grat. 364; *Evans v. Spurgin*, Id. 615; *Coleman v. Lyné's Ex'r*, 4 Rand. 459; *Hatcher v. Hall*, 77 Va. 573, 576. And on abandonment of right: *Nelson v. Carrington*, 4 Munf. 332-343. We think the decree dismissing the petition of appellant, complained of, is plainly right, and are of opinion to affirm the same.

Affirmed.

RICHARDSON, J., absent.

1. Oral license to quarry is revocable. *Williams v. Morrison*, 82 Fed. 177.
2. Irrevocable by statute after mineral struck. *Tipping v. Robbins*, 64 Wis. 546.
3. Exists only where right to mine is not exclusive. *Williams v. Gibson*, 16 M. R.
4. A lease on royalty with no fixed term is only a license. *Wheeler v. West*, 20 Pac. 45.

EDWIN E. THOMAS ET AL. V. ROBERT CHISHOLM ET AL.

(18 Colorado, 105; 21 Pac. 1019. Supreme Court, 1889.)

- ¹ A corporation may locate a mining claim, but to maintain its adverse for the protection of the same it must be shown to be a corporation local to the United States, and that its members are persons who might individually become valid locators.
- ² Defendants in an adverse claim proceeding can not rely upon the weakness of plaintiff's title, but must show affirmatively such a location of their own claim as is entitled to go to patent.

Error to District Court, Chaffee County.

Action to determine adverse mining claim, brought by Edwin E. Thomas, Cyrus W. Pusher and John Taylor, against Robert Chisholm, Mary J. Riggins, H. E. Chapman and John P. Hudgent. Verdict and judgment for defendants, and plaintiffs bring error.

P. J. COSTON, for plaintiffs in error.

H. W. HOBSON and M. G. CAGE, for defendants in error.

ELLIOTT, J.

The parties to this action occupied the same positions as plaintiffs and defendants in the court below as in this court. Defendants having applied for a patent to a certain mining claim, known as the "Tecumseh Lode," plaintiffs filed their adverse claim thereto, and commenced this action, claiming the same premises under the name of the "Starlight Lode." The defendants based their title upon a prior location made by one Joseph Hudson and the Kansas City Mining & Smelting Company. The testimony tended to show that said smelting company was a corporation organized under the laws of the State of Colorado; but the averments of the answer do not show the organization to have been either an association of persons unincorporated, or a corporation organized under the laws of the United States, or of any State

¹ *McKinley v. Wheeler*, 16 M. R. 65.

² *Anthony v. Tillson*, 16 M. R. 26.

or territory thereof; nor is the character, capacity, or citizenship of the organization, or of any of its constituent members, or of Joseph Hudson, in any manner set forth in the answer. The verdict and judgment were in favor of the defendants, and plaintiffs bring the case to this court by writ of error.

The principal question submitted for our determination is: can a corporation organized under the laws of the United States, or some State or territory thereof, make a valid location of a mining claim? At the time of the submission of this cause in this court there had not been an authoritative determination of this question; but we regard the opinion recently delivered by the Supreme Court of the United States in the case of *McKinley v. Wheeler*, 9 Sup. Ct. Rep. 638, as decisive of the question. In that case the plaintiff, McKinley, based his title in part upon a location made by a corporation, all the members of which were citizens of the United States, and were severally and individually qualified and competent to enter upon the public domain, and acquire title to mineral lands upon it by discovery and location. The complaint showed these facts. The defendants demurred to the complaint on the ground that the corporation could not make a valid location.

Mr. Justice FIELD, delivering the opinion of the court, says:

"Section 2319 of the Revised Statutes must be held not to preclude a private corporation formed under the laws of the State, whose members are citizens of the United States, from locating a mining claim on the public lands of the United States."

It is quite unnecessary to repeat, as it would be quite impossible to improve upon, the reasoning by which the learned jurist arrives at the conclusion above stated. Defendants in the case at bar, having recovered a general verdict in their favor, the judgment thereon must be reversed, unless the title of defendants to the ground in controversy was legally established according to the act of Congress of March 3, 1881, amending Section 2326, Rev. St. U. S. Since that amendment both parties in adverse proceedings are to be regarded as actors, and a defendant can not rely upon the

weakness of the plaintiff's title, as in ordinary ejectment cases. Consequently, in this action, defendants could not recover a valid verdict and judgment in their own favor without showing compliance with the requirements of the statutes, State and Federal, such as would entitle them to a patent from the United States: *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. Rep. 652; *Becker v. Pugh*, 9 Colo. 589, 13 Pac. Rep. 906; *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. Rep. 625. It follows, therefore, that defendants, in so far as they rely upon an entry and location by a corporation, must, before they are entitled to such a verdict and judgment as they obtained, aver that the corporation was organized under the laws of the United States, or of some State or territory thereof, and that the members of such corporation were citizens of the United States, and severally and individually qualified and competent to make the location. As to what might amount to *prima facie* proof of citizenship in a case of this kind, in view of Section 2321, Rev. St. U. S., we intimate no opinion: *McKinley v. Wheeler*, *supra*; *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97 and 8 Pac. 621; *North Noonday Co. v. Orient Co.*, 1 Fed. 522. The allegations of defendants' answer are defective in the necessary averments as to the organization of the corporation, and the citizenship of the members thereof. The certificate of incorporation offered in evidence by defendants should not have been received over plaintiffs' objection, in the absence of proper averments in the answer. The objection to the capacity of the corporation under whom defendants claimed title to make a valid location is not raised for the first time in this court, but was made and relied upon at the trial substantially, though not precisely, as here considered. Under the authorities the objection was well taken, and it was error to overrule it: *O'Reilly v. Campbell*, 116 U. S. 418; *Jackson v. Dines*, 13 Colo. 90. The judgment of the District Court is reversed and the cause remanded, with leave to the parties to amend their pleadings, and for further proceedings in accordance with this opinion.

Reversed.

HAMMER V. GARFIELD MINING AND MILLING CO.

(180 United States, 291; 9 S. C. Rep. 548. Supreme Court, 1889.)

When an equity case is tried as an action at law, by calling a jury and examining witnesses before them, their verdict will be treated the same as if it were a finding by the court. It is not reversible practice and the only errors to be considered are such, if any, as exist in the reception of evidence or in the charge.

Proof of corporate existence. A copy of its Articles of Association certified by the Secretary of State is "properly authenticated" for filing in a foreign State, under a statute requiring in general terms an authenticated copy to be filed.

Vague call upheld. A location certificate whose only call for natural objects or permanent monuments as required by the act were the words "about fifteen hundred feet south of Vaughn's Little Jennie Mine:" *Held*, to contain a sufficiently definite description.

Presumption that the tie is valid. The tie called for in a location certificate will be presumed to be a well known natural object or permanent monument until proof is made to the contrary.

Absence of convenient ties—Description by the claim's own stakes. The provision in Rev. Stat. Sec. 2824, that records of mining claims shall contain such "reference to some natural object or permanent monument as will identify the claim," means only that this is to be done when such reference can be made; and when it can not be made, stakes driven into the ground are sufficient for identification, or a reference to a neighboring mine, with distance and date of location, which will be presumed to be a well known natural object in the absence of contradictory proof.

The statutory verification to the location certificate is *prima facie* evidence of the citizenship of all the locators.

What is *prima facie* case. In an action to quiet title to a mining claim, plaintiff having proved a location and record with prior possession, has made a *prima facie* case only to be overcome by proof that his title so gained has been by some means divested or that a better title exists in the defendant.

The burden of proving forfeiture by failure to do annual labor is on the party asserting the forfeiture; and the proof of the forfeiture must be clear and convincing.

Error to the Supreme Court of the Territory of Montana.

E. W. TOOLE and J. K. TOOLE, for plaintiff in error.

EPHA HUNTON, for defendant in error.

¹ *Taylor v. Middleton*, 8 Pac. 594; 67 Cal. 656; *Metcalf v. Prescott*, 16 M. R. 137.

² *O'Reilly v. Campbell*, 116 U. S. 420.

FIELD, J.

This was a suit to quiet the title of the plaintiff below, the Garfield Mining & Milling Company, to a lode mining claim in Montana. It was brought under an act of the territory providing for an action by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest. Comp. St. 1887, § 366. The complaint alleges that the plaintiff is a corporation organized and existing under the laws of the State of New York, for the purpose of carrying on the business of mining and milling ores bearing gold, silver, and other precious metals, in Montana; and that it has complied with all the laws of the territory relative to foreign corporations; that it is the owner of a certain quartz lode in the county of Lewis and Clarke, in the territory, known as the "Garfield" lode or mining claim, which has been surveyed, and is designated upon the records of the office of the United States surveyor general of the territory, and contains an area of 20 acres and 62-100 of an acre, the metes and bounds of which are given; that the plaintiff and its predecessors in interest have been in the possession of and entitled to the lode ever since its discovery and location; that, notwithstanding its right to the possession, the defendant below (the plaintiff in error here), Auge O. Hammer, on or about the 1st of January, 1883, assumed to enter upon the premises and relocate the same, and caused the relocation to be recorded in the records of the county under the name of the "Kinna Lode;" that he pretends to claim an interest or estate therein adversely to the plaintiff, and has made application to the United States land office at Helena, in the territory, for a patent therefor; that the plaintiff has duly filed in that office its adverse claim to the premises, setting forth its nature and origin; and that the proceedings in the land office have been stayed until the final determination by the court of the right of possession to the premises.

Two other persons, by the names of Kinna and Bliss, are also made defendants, who, it is averred, assert some

claim to the premises by a relocation at the same time with the defendant Hammer. The complaint alleges that the claims of all the defendants are without right, and that no one of them has any estate or interest in the mining ground, nor in any part thereof. The prayer of the complaint is:

(1) That the defendants may be required to set forth the nature of their respective claims, and that all adverse claims be determined by a decree of the court;

(2) That by such decree it be declared and adjudged that the defendants have not, nor has any of them, any interest or estate in or right to the possession of the premises, or any part thereof, and that the title of the plaintiff to the same is good and valid, and that it is entitled to their possession; and

(3) That the defendants be forever debarred from asserting any claim whatever to the premises, or any part thereof.

All the defendants filed demurrers to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The defendant Hammer withdrew his demurrer, and filed an answer. It does not appear from the record what disposition was made of the demurrer of the defendants Kinna and Bliss, but as they do not appear to have taken any further part in the defense of the action, and are not mentioned in the judgment or in the appeal taken to the Supreme Court of the Territory, it may be presumed that the action was discontinued as to them.

The answer of Hammer denies that the plaintiff is the owner of the lode described in the complaint, or of any part of it; or that it is now, or has been for a long time, in possession thereof, or of any part thereof; or that it or its predecessors in interest have ever since the discovery and location thereof been in possession of it, or of any part thereof, or entitled to the possession thereof; or that the defendant at any time assumed to relocate the premises, and to cause the relocation to be recorded in the records of the county; or that his claim is without right. The answer also sets up that on the 1st of January, 1883, one Iner Wolf entered upon the premises described, the same being then vacant mineral land of the United States, and discovered thereon a vein or lode of quartz, bearing silver and other precious

metals, and named the same the "Kinna Lode," which he then located in accordance with the requirements of the law, and had a notice of the location filed for record with the county recorder; that afterward the defendant became the purchaser of the premises from Wolf, and has ever since been their owner, and entitled to their possession; and that whatever claim the plaintiff ever had to them became forfeited before the 1st of January, 1883, since which time it has not had any estate, title, or interest therein, or possession thereof. A replication to the answer having been filed, the issues raised were tried by a jury, which found a general verdict for the plaintiff, upon which the court entered judgment in the following form, after stating the pleadings, trial, and verdict: "Wherefore, by virtue of the law, and by reason of the premises, it is ordered, adjudged, and decreed that the plaintiff have judgment as prayed for in its complaint herein against the defendant Auge O. Hammer, and that all adverse claim of the said defendant, and of all persons claiming or to claim the premises in said complaint described, or any part thereof, through or under said defendant, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff is, and it is hereby declared and adjudged to be, the true and lawful owner of the land described in the complaint, and every part and parcel thereof, and that the title thereto is adjudged to be quieted against all claims, demands, or pretensions of the said defendant; and said defendant is hereby perpetually estopped from setting up any claim thereto, or any part thereof." Then follows a description of the premises, and an order that plaintiff recover costs. On appeal to the Supreme Court of the Territory, the judgment was affirmed (8 Pac. Rep. 153), and to review the latter judgment the case is brought to this court.

As seen by this statement, the suit is brought for special relief, and the judgment entered is such as a court exercising jurisdiction in equity alone could render. The courts of Montana, under a law of the Territory, exercise both common-law and equity jurisdiction. The modes of procedure in suits, both at law and in equity, are the same until the trial or hearing. As we said in *Basey v. Galla-*

gher, 20 Wall. 670, 679: "The suitor, whatever relief he may ask, is required to state, 'in ordinary and concise language,' the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others." The court might therefore have heard this case, and disposed of the issues, without the intervention of a jury; but, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the territory: *Ely v. Railroad Co.*, 129 U. S. 291; *Parley's Park M. Co. v. Kerr*, 130 U. S. 256. The finding of the jury, being accepted as satisfactory, must be treated as if made by the court, and, being general, as covering all the issues. The only questions, therefore, we can consider on this writ of error are those arising from the rulings in the admission and rejection of evidence, and those respecting the inferences deducible from the proofs made. These rulings, so far as we deem them of sufficient importance to be noticed, relate to the evidence of the plaintiff's incorporation; to the evidence of the location of the plaintiff's mining claim; to the evidence of the citizenship of the locators; and to the inferences to be drawn from the evidence of the plaintiff's prior possession of the premises.

1. As to the evidence of the incorporation of the plaintiff. That consisted of certain records of the County of Lewis and Clarke, purporting to be a certificate of its incorporation in New York, on the 11th day of October, 1881, duly acknowledged before a notary public of the city and

County of New York, and authenticated by the certificate of the secretary of state of New York, under his official seal, as being a correct copy of the duplicate original on file in his office, and also by a certificate under seal of a commissioner of the territory of Montana, in New York, as being found by him to be a correct copy, after comparison of the same with the original. The introduction of these records was objected to on the ground that the papers were not properly acknowledged or authenticated. The objection is not tenable. The acknowledgment attached to the certificate is in due form, and the authentication of the copy filed by the secretary of state of New York, the public officer charged with the custody of the original, or of one of the duplicate originals, under his official seal, is sufficient to entitle the copy to be placed on file for record in the office of the recorder of the county and with the secretary of the territory. The law of the territory in force at the time, with reference to foreign corporations, provided that before they proceeded to do business under their charter or certificate of incorporation in the territory, they should "file for record with the secretary of the territory, and also with the recorder of the county in which they are carrying on business, the charter or certificate of incorporation, duly authenticated, or a copy of said charter or certificate of incorporation." The law does not specify in what way the copy filed shall be authenticated, and in the absence of any provision on that subject, the certificate of the official custodian, under the seal of his office, must be deemed sufficient. It does not appear that a copy of the certificate of incorporation was filed with the secretary of the territory, but, no objection to the introduction of the county records having been taken on that ground, it will be presumed that such filing existed, and if required, it could have been readily shown. There was no error, therefore, in the ruling of the court admitting the records of the county showing the incorporation of the plaintiff in the State of New York.

2. As to the evidence of the location of the mining claim of the plaintiff. That consisted of the record of the notice of location. To its introduction objection was taken that it did not contain such a description of the property as was

required by law, and did not refer to such natural objects or permanent monuments as would identify the claim. The record is as follows:

"Garfield Lode.—Notice of Location.

"Notice is hereby given that the undersigned, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the United States, and the local customs, laws, and regulations, has located fifteen hundred (1500) linear feet on the above named lode, situated in Vaughan mining district, Lewis and Clarke County, Montana territory, and described as follows: Commencing at discovery stake, running fifty feet east to center stake; then three hundred feet north to stake 'A;' thence fifteen hundred feet west to stake 'B;' thence six hundred feet south to stake 'C,' and fifteen hundred feet east to stake 'D,' and three hundred feet north to place of commencement. This lode is located about fifteen hundred feet south of Vaughan's Little Jennie mine, and described and located on the 4th day of July, 1880.

"JULIUS HORST.

"E. F. HARDIN.

"Territory of Montana, County of Lewis and Clarke—ss. Julius Horst, being first duly sworn, says that he and his co-locator are citizens of the United States, over the age of twenty-one years; that said location is made in good faith, and matters as stated in the foregoing notice of location by him subscribed are true. JULIUS HORST.

"Subscribed and sworn to before me this 26th day of August, 1880. O. B. TOTTEN, County Clerk."

[County Seal.]

Section 2324 of the Revised Statutes, which went into effect on the 1st of December, 1873, provides that records of mining claims subsequently made "shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." These provisions, as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course, the section means when such refer-

ence can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are, in such cases, the most certain means of identification. Such stakes were placed here, with a description of the premises by metes, and, to comply with the requirements of the statute as far as possible, the location of the lode is also indicated by stating its distance south of "Vaughan's Little Jennie Mine" probably the best known and most easily defined object in the vicinity. We agree with the court below that the Little Jennie mine will be presumed to be a well known natural object or permanent monument, until the contrary appears, where a location is described as in this notice, and is further described "as being 1,500 feet south from a well known quartz location, and there is nothing in the evidence to contradict such a description, distance, and direction."

3. As to the citizenship of the locators of the mining claim. The Revised Statutes open the mineral lands of the public domain to exploration and occupation and purchase by citizens of the United States and persons who have declared their intention to become citizens. It is therefore objected here that there is no evidence of the citizenship of the original locators, but the objection is not tenable. The oath of one of the locators, accompanying the recorded notice of location, as to their citizenship, is *prima facie* evidence of the fact, and it will be deemed sufficient until doubt is thrown upon the accuracy of his statement.

4. As to the inferences deducible from the plaintiff's prior possession of the premises. The ruling of the court on that head is contained in its instructions to the jury. Though addressed to that body in an action seeking equitable relief, they indicate the judgment of the court as to the legal conclusions which should follow from the prior possession established. The evidence showed that the parties through whom the plaintiff derives its title had located the lode mining claim in due form of law, and had within proper time recorded the notice of location, and also tended to show that each year since the location, the original locators, or the plaintiff, their successor, had caused work to be

done upon the mine sufficient to retain its ownership and possession. Upon this evidence the court instructed the jury as follows:

"If you believe from the evidence in the case that prior to the 31st day of December, A. D. 1882, the plaintiff was in the quiet and undisputed possession of the premises designated in the complaint as the 'Garfield lode,' the validity of the original location of which is not questioned in the pleadings or testimony, claimed by the defendant as the 'Kinna Lode;' that the boundaries of said claim were so marked upon the surface as to be readily traced; and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place, bearing gold, silver, or other precious metals—then this constitutes a *prima facie* case for the plaintiff, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture or other divestiture, and the acquisition of a better right or title by the defendant." The Supreme Court of the territory was of opinion that this instruction was erroneous so far as it states that the validity of the original location of the Garfield lode is not questioned in the pleadings, but considered that the error in this particular was not prejudicial to the defendants. We do not think that the statement mentioned was erroneous. The answer does not distinctly put in issue the validity of the original location. It confines its traverse to the existing right and ownership of the plaintiff in the whole of the mining claim, to its long possession of the premises, and to the possession of the plaintiff and its predecessors since the discovery and location of the mining claim, and then sets up the alleged forfeiture of the claim by the plaintiff and the defendant's relocation of it. Under these circumstances we are of opinion that the instruction was right in all particulars. But we also agree that if error intervened it was not prejudicial to the defendant. The Supreme Court of the territory treated the instructions precisely as though given in an action at law; trials of issues in suits in equity there being, as already stated, generally governed by the same incidents as trials of issues in actions at law. In that view, the instructions are not, in our judgment, open to any

criticism. It is only as showing the ruling of the court respecting the inferences deducible from the prior possession of the plaintiff that we examine them, and on that subject they express the law correctly. If the trial were treated as of a feigned issue directed by the court, different considerations would arise. An erroneous ruling in that case would not necessarily lead to a disturbance of the verdict: *Barker v. Ray*, 2 Russ. 63, 75; *Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 U. S. 247, 250, 252; *Wilson v. Riddle*, 123 U. S. 608, 615.

As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meager and unsatisfactory, and was completely overborne by the evidence of the plaintiff: *Belk v. Meagher*, 104 U. S. 279. A forfeiture can not be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.

Judgment affirmed.

1. A valid location carries with it the right of exclusive possession. *Hauswirth v. Butcher*, 4 Mont. 299.

2. The location must be distinctly marked on the ground and identified in the record. *Id.*

3. What are permanent monuments is a matter for the jury. *Russell v. Chumaseo*, 15 M. R. 508. Parol testimony is sufficient to show their permanency. *Metcalf v. Prescott*, 25 Pac. 1037.

4. The sufficiency of the monuments depends on the condition of the ground, and whether they were in fact sufficient is a question for the jury. *Taylor v. Middleton*, 8 Pac. 594; 87 Cal. 658.

5. Posting notice does not amount to location. *Newbill v. Thurston*, 65 Cal. 419.

6. Development—something more than a location stake and record—is necessary to hold a claim under district regulations. *Cons. Rep. Co v. Lebanon Co.*, 12 Pac. 212.

7. The allegation of a location in terms is an allegation of a conclusion of law. *Deemer v. Falkenburg*, 12 Pac. 717.

8. Stakes need not be necessarily within the lines of the claim. *West Granite Co. v. Granite Co.*, 17 Pac. 547.

9. He who stakes his placer claim first has the prior title; has a reasonable time to record and will not be cut out by later stakes and prior record. *Gregory v. Pershbaker*, 15 M. R. 602.

10. Claim maintained though all the stakes but one were on other locations. *Doe v. Tyler*, 14 Pac. 875; 78 Cal. 21.

11. Ratification of location through agent, by bringing suit. Location by infants. Record not essential. *Thompson v. Spray*, 72 Cal. 528; 14 Pac. 182.

12. Shaft adopted as discovery need not show the vein. *O'Donnell v. Glenn*, 19 Pac. 802.

13. Whether stake is sufficient monument is for the jury. *Id.*

14. Boulder is good monument; the same as to a claim used as reference which claim does not exist. *Gamer v. Glenn*, 20 Pac. 654.

15. An excess staking in length or width does not invalidate except as to the excess, when made without fraud, and the mistake corrected before the rights of the third parties attached. *Stem Winder Co. v. Emma Co.*, 21 Pac. 1040.

16. J. posted notice but failed to mark boundaries. He was ejected by defendant, who also posted notice and failed to mark boundaries. The grantee of J. worked on the claim after the attempted location by defendant. Held, that J. was in continuous possession and defendant a trespasser. *Neuebaumer v. Woodman*, 26 Pac. 900.

17. Courts will not enforce a contract providing for the use of names of nominal locators taking up land in excess of the legal limit of location. *Mitchell v. Cline*, 24 Pac. 164.

18. Where a prospector locates for a non-resident, followed by deed from the non-resident to the prospector, no presumption of fraud arises. *Rush v. French*, 25 Pac. 816.

19. Claims may be located by agent without express authority. *Id.*

20. Under the miners' regulations enforced before May 10, 1872, possession and occupancy, though not accompanied by formal location, would hold a claim against a subsequent locator. *Id.*

21. Where the vein passes through both end lines, the fact that it meanders between the end lines does not invalidate its substantial parallelism to the strike. *Cheeseman v. Hart*, 16 M. R.

22. The fact that a location is crossed obliquely by another claim does not make the line of the intersection the end line of the location. *Id.*

23. Where the interference between two claims is quit claimed to one, the conflict becomes part of the claim which it covers. *Id.*

24. The surveyed end lines are not necessarily the legal end lines, if they fail to cross the actual outcrop. *Id.*

25. A discoverer is to be protected in his possession until sufficient excavations can be made to disclose whether the vein will justify work, up to the time limited by the statute for doing such work. *Marshall v. Harney Peak Tin Co.*, 47 N. W. 290.

26. A perfected mining claim must include (1) discovery, (2) notice, (3) location, (4) marking boundaries, (5) record. *Id.*

27. Proof of discovery and staking as early as 1862 need not be so specific as in the case of a recent location. *Becker v. Pugh*, 29 Pac. 178.

28. "A valid location of a mining claim may be made whenever the

prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore." *Burke v. McDonald*, 29 Pac. 98.

29. A location may be made on vein matter which does not show ore. *Burke v. McDonald*, 29 Pac. 98.

30. There must be a discovery of ore or mineral in place. Essentials of location and of location certificate under Colorado and United States Mining Acts, stated. *Cheesman v. Shreeve*, 40 Fed. 787.

METCALF ET AL., Respondents, v. PRESCOTT ET AL.,
Appellants.

(10 Montana, 288; 25 Pac. Rep. 1037. Supreme Court, 1891.)

¹Permanent monuments. The question as to whether an object described in a notice of a location of a mining claim is a permanent monument is a matter for proof, and can not be determined by the court from an inspection of the location notice.

Where the proper county is not called for in the certificate but the description is otherwise sufficient so that the claim could be found, the name of the county may be rejected as surplusage and the record will hold as valid.

Surplusage. When an instrument, as a location notice, contains a sufficient description to ascertain the premises to which it applies, without the aid of a portion of the description, which is false, the latter portion may be regarded as surplusage.

Null affidavit. A location notice, the affidavit to which does not contain notarial evidence that the party making it took an oath, or was ever present before the officer, is not a "declaratory statement in writing on oath," within the meaning of Section 1477, fifth division of the Compiled Statutes.

Proof aliunde of the verification not allowed. Section 1477, fifth division of the Compiled Statutes, providing that the locator of a mining claim shall make and file for record a declaratory statement in writing on oath, requires the oath to be part of the record, and evidence *aliunde* the statement, that the oath was taken after location and before recording, is inadmissible.

Appeal from District Court, Jefferson County; THOMAS J. GALBRAITH, Judge.

The action is a contest between claimants of mining ground on the public domain of the United States. The plaintiffs below, respondents here, relied upon their claims of the Ida May and Corbett lodes. They were contested by the defendants, appellants here, with their New Brunswick and Crucible lodes. The gist of the case was reached by the partial sustaining of a demurrer to the answer, and a motion to strike out a portion of the same. Therein the court settled propositions hereinafter stated, and the trial following was *pro forma*. Four points were argued by counsel, which with the facts upon which they are presented are:

¹ *Flavin v. Mattingly*, 19 Pac. 884.

1. The location notice of the Crucible lode states, among other things: "This lode is situated in Vaughn's unorganized mining district, Lewis and Clarke County, Montana Territory, and the discovery shaft is 335 feet from the west end of the claim. * * * The exterior boundaries of this location are distinctly marked by posts or monuments at each corner of the claim, so that its boundaries can be readily traced, viz.: Beginning at the N. E. corner, from which corner No. 4, survey No. 889, bears northerly about one mile; thence westerly 1,500 feet to post marked 'N. W. corner Crucible;' thence southerly 600 feet to post marked 'S. W. cor. Crucible;' thence 1,500 feet to post marked 'S. E. cor. Crucible;' thence northerly 600 feet to post marked 'N. E. cor. Crucible,' and place of beginning."

As to this description the defendants plead, in their answer: "That the corner No. 4 of said survey No. 889, referred to in the said Crucible notice of location as being about a mile distant therefrom, lies wholly within the said County of Jefferson, is a fixed, definite, and permanent monument, and, taking the said notice of location, and starting at the initial point named, from the calls of said notice, one would of necessity, and without uncertainty, find the said claim in the County of Jefferson." It further appears from the answer that the notice of location was duly filed in the office of the county recorder of Jefferson County, and not of Lewis and Clarke.

The court held that this location notice was not competent, as not entitled to record in Jefferson County, by reason of the statement in the notice that the claim was situated in Lewis and Clarke County; and also that the allegation and proposed proof that said corner No. 4 shows the claim to be in Jefferson County was incompetent. This is assigned as error.

2. The location notice of the New Brunswick shows these facts: The notice itself is signed by the locators. Then appears an unsigned affidavit, as follows: "Territory of Montana, County of Lewis and Clarke, ss. Charles K. Cole, being duly sworn, says that he is of lawful age, and one of the locators and claimants of the foregoing quartz lode mining claim; that said location is made in good faith; and that the matters set forth in the foregoing notice by him

subscribed are true.———. ERASTUS D. EDGERTON, Notary Public in and for Montana Territory. [Notarial Seal.]”

Said Charles K. Cole was one of the locators, as appears upon the notice. The notice was recorded in Jefferson County. It further appears by averment of the answer “that said Charles K. Cole, the person named as affiant in the affidavit attached to said notice of location, in truth and in fact swore to the same before a notary public (Edgerton) therein named, prior to the record thereof, and subsequent to January 2, 1885.” The District Court held that this notice, not being sworn to, was not entitled to record, and defendants could not claim title thereunder. This conclusion must have been reached by taking the face of the affidavit alone, and disregarding the *aliunde* matter pleaded in the answer. This is assigned as error.

3. The New Brunswick was located January 2, 1885, and recorded February 5, 1885. The record was more than twenty days after the location. But it appears “that between January 2, 1885, and February 5, 1885, no person whomsoever occupied, possessed, or endeavored to assume to occupy or possess the claim or any part or portion of the said New Brunswick lode, other than the said locators above named.” Was the record, under these circumstances, made in time?

4. The Ida May location notice states: “This lode is situated in unorganized mining district, Jefferson County, Montana Territory, and the claim is situated about one mile southeasterly of the Peerless Jennie mine. The joining claims are the Corbett quartz claim on the east; no others known.” The Corbett location notice states: “This lode is situated in Frowner’s unorganized mining district, Jefferson County, Territory of Montana; and the adjoining claim is the Leslie on the north.”

The point is made that these descriptions are not “by reference to some natural object or permanent monument as will identify the claim.” Rev. St. U. S., § 2324. An opinion upon these two last points is not required for a decision of the case; but they will be treated, for the reason set forth in the opinion below.

TOOLE & WALLACE, for appellants.

COMLY & FOOTE, and SHOBER & ROWE, for respondents.

DE WITT, J. (after stating the facts as above).

We will discuss the points in the order outlined in the foregoing statement of the case.

1. The Crucible claim was situated in Jefferson County. Its notice of location was recorded in Jefferson County. Its location description names corner No. 4 of the survey No. 889, which corner defendant alleges lies wholly within Jefferson County; and further alleges that the described courses and distances, when run by reference to this survey corner No. 4, locate the claim wholly in Jefferson County. It is not for the court to say, from an inspection of the location notice, whether or not this survey corner was a permanent monument. This is a matter for proof: *Russell v. Chum- asero*, 4 Mont. 317; 1 Pac. 713; *O'Donnell v. Glenn*, 8 Mont. 248; 19 Pac. 302. Then, if defendants had been allowed to attempt to prove this, as they had the right to do, and had succeeded, they would have been in this position: they would have shown where their claim was by reference to a permanent monument; they would have shown thereby that it was in Jefferson County, the county in which they had properly made their record. Are they to lose their claim because they stated in their notice that the premises were in Lewis and Clarke County? The statement of the county, in the notice, is not required by law; nor does it appear that it was required by any rules of miners consistent with the laws of the United States or the then territory; nor is it necessary in this case, in order to find or identify the claim. It was surplusage. Does this surplusage vitiate an otherwise good description, and a legal recording? *Falsa demonstratio non nocet*. See cases in 2 Pars. Cont. (5th Ed.) 555, note *d*, and page 514. The rule applies the more forcibly in a case, as that before us, where the false description is surplusage. "So much of the description as is false is rejected, and the instrument will take effect, if a sufficient description remains to ascertain its application." 1 Greenl. Ev. § 301, and cases cited; also *Wade*, Notice, §§ 184, 185; *Partridge v. Smith*, 2 Biss. 183; *Worthington v. Hylyer*, 4 Mass. 195; *Jackson v. Loomis*, 18 Johns. 31; *Reamer v. Nesmith*, 34 Cal. 624. There can be

no doubt that, if defendants be successful in proving what they allege to be the fact as to a permanent monument, the description is sufficient, and the error in stating the county, under the circumstances of this case, is harmless. We are satisfied that the District Court erred. The notice of location is competent, and proof whether the corner No. 4 of survey No. 889 be a permanent monument is competent.

Upon the subject of description of mining claims, see *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Flavin v. Mattingly*, 8 Mont. 246, 19 Pac. 384; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Garfield M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153. The foregoing is sufficient for the decision of this appeal, but, as the case goes back for further proceedings, we will express our views upon the additional points raised as a guide to the District Court in the further consideration of the case; and, therefore—

2. The next point is whether the location notice of the New Brunswick claim is defective, by reason of the condition of the verification. This court, after incidentally doubting the validity of the law of the territory requiring a location notice to be verified (*Wenner v. McNulty*, 7 Mont. 30, 14 Pac. 643; afterward in *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302), met the proposition squarely, and held the law to be good. While we can conceive doubts as to this power of the territorial legislature, we do not feel it our duty to disturb the rule in *O'Donnell v. Glenn*, and the practice established upon that rule. We therefore sustain the law, which is as follows: "Any person or persons who shall hereafter discover any mining claim upon any vein or lode * * * shall within twenty days thereafter make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath, made before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States." Section 1477, p. 1054, Comp. St.

The question, then, arises, is the location notice of the New Brunswick, with its attachment, "a declaratory statement in writing, on oath?" It is "a declaratory statement in writing;" and, if it is properly "on oath," the verification

by Cole, one of the locators, is sufficient, without his co-locators joining with him: *Wenner v. McNulty, supra*. An affidavit is one method of taking an oath. An affidavit is "a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath:" Bouv. Law Dict. Appellant cites *Shelton v. Berry*, 19 Tex. 154, 70 Amer. Dec. 326; *Jackson v. Virgil*, 3 Johns. 540; *Millius v. Shafer*, 3 Denio, 60; *Ede v. Johnson*, 15 Cal. 57; *Burns v. Doyle*, 28 Wis. 460; and *Crist v. Parks*, 19 Tex. 234—to the effect that the affidavit need not be signed. But the want of signature to this paper is not its most serious defect, if it be attempted to view it as an affidavit. There is no jurat thereto. It does not appear by the hand of the notary that the paper was either subscribed or sworn to, or that the party was ever present before the officer. We are not cited to any authority, or given any reason, that would warrant us in holding this paper to be an affidavit. In all the cases presented by appellants (last *supra*) there appeared some sort of authorization or certification from the notary, which evidenced the oath having been taken. In the paper before us there is nothing but the notary's name and official title. It does not appear that the party took an oath, or was ever present before the officer. We can not call this an affidavit, or an oath by virtue of an affidavit, or by virtue of any certification. But appellants urge that an affidavit is not required, but only a statement on oath. Granted for the argument's sake; but have we any statement on oath? We have no notarial evidence of such fact. If the notary had officially certified, attested or declared in any manner that the locator made the statement on oath, we would be inclined to view the matter more favorably. Certainly there is nothing whatever on the paper to remotely indicate that Charles K. Cole, the locator, made the statement on oath. In *Murray v. Larabee*, 8 Mont. 212, 19 Pac. Rep. 574, there appeared at the end of a deposition an alleged certificate. It was signed by the deponent, and then followed: "Sworn to and subscribed before me, this eighteenth day of February, 1885. OMERE VILLERE, Not. Pub. [Notarial Seal.]" The court held "the simple statement at the end of the deposition, of 'sworn to and subscribed

before me,' is no certificate of anything, except that the witness swore to and subscribed his name to the deposition." If, under those circumstances, the notary certified to nothing except that the deposition was subscribed and sworn to, then we must hold that, in the case at bar, the simple signature of the notary, without even the jurat, which was present in the case of *Murray v. Larabie*, did not certify to anything.

We are of opinion that the paper before us is not, intrinsically, a declaratory statement on oath. But counsel offered to prove *aliunde* the notice that the oath was taken after location, and before recording. Let it be remembered that the statute (Sec. 1477, Div. 5, Comp. St.) requires that the locator shall "make and file for record a declaratory statement in writing, on oath." It shall not only be made "on oath," but "filed for record on oath." We are of opinion that the statute intends that the oath shall be part of the record. Without directly so declaring, there seems to be a strong implication from analogy to other recording laws that one office of the oath is to entitle the instrument to record. We believe that any other view would open the door to abuses, mischiefs and errors. Suppose notices may be recorded with no affidavit or certificate of oath, although the oath may have been actually taken by the party. There would be no official evidence preserved of the act of the officer taking the oath; and titles to valuable mining property would be made to depend upon the doubtful memories of notaries public, and perhaps years after the event, or even after the death of the notary; and the temptation would be opened to such officers to remember or forget, as interests ulterior to their duties might sway them. We feel that it is utterly unsafe to sanction such a practice. We are of opinion that the view of the District Court as to the New Brunswick location notice was correct, and we affirm that ruling.

3. It is conceded by respondents, in their brief, that they claim no rights by virtue of the fact that their adversary claim, the New Brunswick, was not recorded within twenty days after discovery. That disposes of this point.

4. Under the view expressed in paragraph 1, above, and on the authority of *Russell v. Chumaseiro*, it must be held

that in the location notices of the Ida May and Corbett claims the reference to adjoining claims is sufficient to allow the notices to be introduced in evidence, and proof to be offered, whether such adjoining claims are permanent monuments.

The judgment is reversed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

BLAKE, C. J., and HARWOOD, J., concur.

1. A record tying the claim to mountain peaks without naming or describing them, stating that the claim was on a certain river, near a certain city, and the position of the shaft on a certain creek with relation to a neighboring waterfall, held sufficiently definite. *Jackson v. Dines*, 21 Pac. 918.

2. Where the question in issue was whether or not a location notice had been posted at discovery it was proper to admit the location certificate, original and amended, for consideration by the jury in such connection. *Coleman v. Davis*, 21 Pac. 1018.

3. Call for two trees (its own corners) and a ravine, held sufficient description. *Carter v. Bacigalupi*, 23 Pac. 362.

4. Monuments called for, presumed to be permanent and natural. *Id.*

5. A record is not required by statute. A notice containing sufficient description, equivalent to. *Id.*

6. Montana statute required the verification to give date of location. Common error of one-third of certificates omitting this point, held not sufficient to make a valid custom. *O'Donnell v. Glenn*, 23 Pac. 1018.

7. An amendment to a location certificate made before adverse rights attach, relates back to the original location. *McGinnis v. Egbert*, 15 M. R. 329.

8. Calls for trees as boundaries—in fact stakes on the ground but on adjoining claim called for, upheld. *Upton v. Larkin*, 15 M. R. 404.

9. Must be verified in Montana; this requirement does not interfere with disposal of public domain. *O'Donnell v. Glenn*, 19 Pac. 302.

10. Stake—whether a permanent monument a question for the jury. *Id.*

11. The whole question for the jury; location certificate calling for its own stakes. *Flavin v. Mattingly*, 19 Pac. 384.

12. On proof of, location under is presumed to have been regular. *Jantzen v. Arizona Co.*, 20 Pac. 93. To like effect, *Cheesman v. Hart*, 16 M. R.

13. Call for adjoiners is good description. Cases on description reviewed. *Seidler v. Lafave*, 20 Pac. 789.

14. Parol evidence allowed to identify monuments. *Seidler v. Maxfield*, 20 Pac. 794.

15. Testimony is admissible that a person familiar with the locality could not find the claim from the description as a guide. *Dillon v. Bayless*, 27 Pac. 725.

CHAMPION MINING CO., Appellant, v. CONSOLIDATED
WYOMING GOLD MINING CO., Respondent.

(75 California, 78; 16 Pac. Rep. 513. Supreme Court, 1888.)

- ¹ When veins unite on the dip the oldest location holds. The vein of the Phillip and the vein of the Wyoming (adjoining lode locations) at the depth of about 500 feet were found to unite and become one vein. The Wyoming was patented in 1874 and the Phillip, which was still a possessory claim, failed to prove a valid location prior to the Wyoming patent. *Held*, that the Wyoming held a presumption of location at least as early as its patent, and so being under the findings the oldest location, took the vein below the point of union.
- Patent not conclusive as to vein below point of union. The perfecting of an application for patent on a lode is conclusive as to rights upon which another might have filed an adverse claim; but not upon such a question as the union of two veins on the dip, such union being unknown at the time of the application.
- No error when evidence immaterial. Where in any event the title of defendant goes back to its patent at least, and such title at that point antedates the plaintiff's proof of title—whether the court erred or not in allowing proof of a still earlier date to the defendants' title becomes wholly immaterial.
- No trespass, no injunction. A plaintiff claiming to be the owner of a mining location, is not entitled to an injunction to restrain the defendant from mining upon such location, if the defendant never has mined thereon, and never has threatened so to do.
- Agreement to divide underground gore, caused by divergence of end lines. Where the north end line of one quartz mining claim is identical with the south end line of an adjoining claim, at a place where the ledge crosses from the ground of one into that of the other, and such end lines at another place diverge, the owners of the claims have the entire ownership of the ledge included within their extreme end lines, with the exclusive right to follow its dips and angles laterally; and may, as against a subsequent locator, agree between themselves as to the right to work the portion of the ledge included within the piece of ground formed by the divergence of their end lines.

In bank.

Appeal from Superior Court, Nevada County; J. M. WALLING, Judge.

The Champion Mining Company, the plaintiff below, ap-

¹ *Lee v. Stahl*, 16 M. R. 152.
VOL. XV—10

peals from a judgment for defendant, and from an order denying a new trial.

EDWARD LYNCH, for appellant.

GAYLORD & SEARLS and VAN CLIFF & GEAR, for respondent.

McFARLAND, J.

This action was brought to recover damages for alleged trespasses by defendant upon the mining claims of plaintiff, and to obtain an injunction against similar trespasses in the future. The answer admits that defendant, by accident, took from plaintiff's claims gold-bearing quartz of the value of \$120, but denies the other material averments of the complaint. The court below (sitting without a jury) found in favor of defendant; gave judgment for plaintiff for said \$120, but for no more; and denied the prayer for an injunction. Plaintiff appeals from the judgment, and from an order denying a new trial.

The transcript is very lengthy, containing a great many exceptions, about a dozen maps, and several hundred pages of oral testimony and documentary evidence. The briefs (filed in addition to the oral argument) are exceedingly elaborate and able, and very ingenious. The whole record presents a formidable mass somewhat discouraging to one seeking to know what there is in it. Upon a thorough examination, however, many of the apparent difficulties vanish, and the case is resolved into a few main propositions.

Each of the parties is a mining corporation, and each owns a body of quartz mining claims. The surface ground of each party adjoins that of the other. In the ground of plaintiff there is a quartz ledge called the "Phillip" ledge, and in the ground of defendant there is a ledge called the "Wyoming." After the respective rights of the parties to these ledges had vested, it became known for the first time, that at various levels beneath the surface, and at a general average depth of about 500 feet, these two ledges (the Phillip and Wyoming) *united*, and from thence downward formed only one ledge. Defendant, by accident or mistake,

took \$120 worth of quartz out of the Phillip ledge at a point above its junction with the Wyoming, for which judgment was confessed; but the real trespass complained of was that the defendant took gold-bearing quartz out of the united ledge *below* the junction. And so the main question in the case is, who owns the united ledge?

The *rule* by which such a question must be determined is stated in Section 2336, Rev. St. U. S., and is as follows: "Where two or more veins unite, the oldest or prior location shall take the vein below the point of junction, including all the space of intersection." Consequently the main question depends upon the underlying question, which party holds under the older location, and the most important exceptions which appear in the record were to rulings of the court as to the admissibility of evidence offered upon this question of prior location.

The grantors of defendant received a United States patent for the Wyoming ledge (or, at least, for the ground in which the apex and upper part of the ledge are situated) on the nineteenth day of September, 1874. The plaintiff has not a patent for the land in which the Phillip ledge is situated, but holds a possessory title thereto under general mining customs and the laws of the United States and of this State upon the subject. And this latter kind of title is, of course, as good, for the purpose of a suit like the present one, as a patent.

The defendant, for the purpose of showing a valid location of the Wyoming ledge at certain periods prior to the date of the patent, introduced, against the objections and exceptions of plaintiff, the preliminary papers and proceedings filed and had in the United States Land Office upon which the patent was based. These papers and proceedings, if properly admitted, showed, or intended to show: 1. That the official survey of the Wyoming mine, as afterward incorporated into the patent, was made December 10, 1872. The application for the patent, which was filed March 8, 1873, stated that the mine was located in 1851 or 1852 by persons then unknown, and that, if recorded, the record was destroyed by the fire which burned the court house in Nevada City in 1856; and also, among other things, that the applicants were in the quiet and actual possession of, and

that there had been no opposing or adverse claim to the premises "for two years last past," that being the statutory period of limitation for actions relative to mining claims. The court below seemed to take the view that these proceedings in the Land Department of the United States constituted an authoritative adjudication of the truth of the statements in the application, which bound the plaintiff. And counsel for defendant strenuously argues that, as the law of Congress provides that actual possession, without any adverse claim, during the period of statutory limitation, gives a right to a patent, and as the application in question put the right to a patent on that ground, therefore it should be held to have been conclusively adjudicated that the Wyoming claim was located at least two years before the date of the application, which would be March 8, 1871.

If the determination of this appeal necessarily involved the correctness of the ruling of the court below on this point, a very grave question would be presented. Where an application for a patent to mining land has been filed in the United States Land Office, and notice thereof given as required by statute, and no adverse claim has been filed, and the proceedings have regularly culminated in a patent, it may be said generally that the proceedings are conclusive against a third person as to those things with respect to which he might have filed an adverse claim. But, with respect to the united ledge which was afterward discovered to be a union of the Wyoming and the Phillip, there was nothing in the application for a patent to the Wyoming claim which called for any contest by the owners of the Phillip. The application for the Wyoming claim, if granted, would result in a patent for only the surface ground claimed, and the ledges whose apexes were within it. If it should turn out that a ledge within that ground united with another ledge, the property of an adjoining owner, the ownership of the united ledge would have to be determined upon the principle of priority of location. Moreover, at the time of the Wyoming application and patent, the union of the two ledges at a great depth in the earth was entirely unknown, and not even suspected. The owners of the Phillip ledge, therefore, with respect to the

present claim to the united ledge, would and could not have had any standing in the land department as adverse claimants to the Wyoming application. It is therefore somewhat difficult to see how the question of priority of location between the Phillip and Wyoming ledges could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how *ex parte* proof, offered in the Wyoming application for the satisfaction of the United States Government, is admissible in the case at bar, where the contest is about something not appearing on the face of that application, or involved in that proceeding. If, therefore, the determination of this appeal necessarily depended upon the correctness of the ruling of the court below, admitting the proceedings in the land office in evidence, we would be strongly inclined to hold such ruling to have been erroneous. In the view which we take of the case, however, it is not necessary to pass conclusively upon that question.

The court below found that there was no valid location of the Phillip ledge until 1879—about five years after the issuance of the Wyoming patent. The finding is “that no boundaries of said location [the Phillip] were ever marked upon the ground so that the same could be readily traced prior to March 25, 1879.” This is a *finding of fact*; and, unless it can be successfully attacked as not being supported by the evidence, then it is immaterial whether the admission of evidence to show a location of the Wyoming claim at a date prior to the patent was erroneous or not; for, of course, the title of defendant would be good, at least from the date of the patent, and if at that time there was no location of the Phillip claim, then the Wyoming must be held to have been the prior location. And as to the sufficiency of the evidence to support the finding on this point, we need only say that we could not disturb that finding even though we were to go far beyond the limits of the rule so often laid down by this court for the review here of questions of fact. There was clear proof of a location of the Phillip claim on the twenty-fifth of March, 1879; and the court found that there was a location on that day, but that there was none prior to that time. Now, to upset this finding, it must be

affirmatively shown that, under the evidence, it was the clear duty of the court, forced upon it by evidence without material conflict, to find a location of the Phillip claim prior to 1879, and, indeed, prior to 1874—the date of the Wyoming patent. But such a proposition is clearly not maintainable. We, of course, will not recite the evidence here; and it is sufficient to say that if the court had found the other way it would have done so upon an exceedingly slender basis.

The record shows many exceptions to rulings of the court admitting or rejecting offered evidence; but they mostly relate to evidence offered to prove or disprove a location of the Wyoming at dates prior to the patent. But, as we have stated, these rulings, whether right or wrong, were immaterial. With respect to the rulings of the court upon offers of evidence to prove or disprove the true dates of the locations of the Phillip ledge, and of the other claims of appellant, we see no material error. (What has been said of the Phillip ledge applies equally to the small location claimed by appellant called the "Muller," and also called the "Ural Extension." It is in the same category with the Phillip, except that the court also finds that it was *never* marked on the ground so that the boundaries could be readily traced, and that no gold-bearing ledge having its apex within the claim was ever discovered.) And, as the alleged trespasses were committed upon the united ledge claimed by appellant by virtue of its ownership of the Phillip ledge, the above views are determinative of the main controversy in the case against the appellant.

2. There are two other propositions presented by appellant. The respondent has a patented mine called the "Ural;" and the appellant claims a ledge in its adjoining ground called the "New Year's" and "New Year's Extension." And appellant contends that near the southerly end of respondent's ground the Ural ledge passes through the side line of the Ural patented ground into the New Year's ground; thus making said side line, in law, an end line. But the court finds that said line is not an end line of the Ural ledge of respondent, and that there is no sufficient evidence to show where said ledge crosses the lines of the Ural patent. It

finds, also, that the location of the Ural mine was prior to that of the New Year's claims of appellant. Moreover, it finds that respondent has not mined, and does not threaten to mine, any ground claimed by appellant, except the united ledge formed by the junction of the Phillip and the Wyoming as above stated. And these findings are sustained by evidence. There is therefore no basis here for an injunction or damages.

3. At the northern end of the Wyoming patented ground there is another patented claim called the "Schmidt Claim," owned by the Nevada City Mining Company. And appellant contends that the north line of the one was not identical with the south line of the other; that is, that between the north line of the Wyoming, as patented, and the south line of the Schmidt, as patented, there was a small piece of ground not included within the lines of either patent; and that, therefore, the respondent would not be entitled, as against the owners of the Phillip, to follow the Wyoming ledge under this piece of land, or to the united ledge if found there. But the court found, upon sufficient evidence, that the Wyoming and Schmidt locations were both long prior to that of the Phillip; that they always adjoined each other on the north and south; that the southwest line of the Schmidt patent was for a long distance identical with the north line of the Wyoming patent; and that, *where these two lines were thus identical*, the Wyoming ledge crosses over the Wyoming patented ground into the Schmidt patented ground, leaving no intermediate ground between the two claims. This undoubtedly gave to the owners of the Wyoming and Schmidt claims the entire ownership of the ledge from the northerly end of the one to the southerly end of the other, with the exclusive right to follow its dips and angles laterally. It appears that at a point a considerable distance easterly of the point where the ledge crosses the line common to the Wyoming and the Schmidt, as aforesaid, the northerly patented line of the Wyoming and the southerly patented line of the Schmidt diverge, leaving a small triangular piece of ground between; and the two companies, by agreement, divided this piece of land—or, rather, the right to work the ledge under it—between them. This

they had the right to do, as against any third party subsequent in location.

From a thorough examination of the whole case we find no reason to disturb the judgment of the court below.

Judgment and order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; TEMPLE, J.; MCKINSTY, J.

SEARLS, C. J., having been of counsel in the court below, did not participate in the decision.

LEE ET AL. V. STAHL.

(18 Colorado, 174; 22 Pac. Rep. 436. Supreme Court, 1889.)

Force of the opinion on former appeal. When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case upon the same state of facts, is higher authority than *stare decisis*; it is *res judicata*, so far as the particular action is concerned.

Cross Lode need not adverse. A true cross vein is excepted out of the grant of the patent by virtue of Section 2336, Rev. St. U. S. And, whether a junior or senior location, it is not affected by failure to adverse, except at the point of actual lode intersection. Section 2344 does not *ex proprio vigore* reserve out of the grant rights other than cross veins acquired prior to the act of 1872, but secures the protection of such rights to those who avail themselves of the adverse procedure prescribed by the act itself.

The crossing of lodes does not mean the crossing of two patents, but the actual crossing of the two veins themselves.

Veins which unite, but do not cross each other, are within the exception of Section 2336 when they unite on the "dip," or in their downward course; but not when they unite on the "strike," or on their horizontal extension. The word "below," in Section 2336, does not mean "beyond."

Object of the Act to settle conflicts. It was the design of the act of 1872 (Sections 2325, 2326, Rev. St. U. S.) to have all conflicts, so far as

¹ S. C. on former appeal, 9 Colo. 208; 11 Id. 179.

² *Morgenson v. Middlesex Co.*, 17 Pac. 513.

practicable, settled by the issuance of the patent through the adverse proceedings therein provided for.

(Syllabus by the Court.)

Appeal from District Court, Jefferson County.

BELFORD & WIKOFF, for appellants.

C. C. POST and R. S. MORRISON, for appellee.

ELLIOTT, J.

Ernest Stahl, the plaintiff below, commenced this action in 1878, alleging his ownership in fee of the Lone Tree lode, and complaining that the defendants had ousted him therefrom, and still unlawfully withhold the possession thereof. The case has been several times tried in the District Court, and this is the second time it has been before this court on appeal. The plaintiff's patent from the United States to the Lone Tree lode shows the date of entry at the Land Office to have been April 30, 1873. Defendants' patent to the Argentine shows the date of entry to have been July 3, 1875. Defendants claim to have made the discovery and location of the Argentine in 1865, prior to the discovery and location of the Lone Tree, and to have complied with all the laws, State and Federal, and all the local rules and regulations respecting such locations; and that the vein of the Argentine is the premises from which plaintiff claims to have been ousted. This claim was denied by plaintiff. The territories described in the two patents cross each other; but whether or not there is an actual crossing of the two veins within the limits where the two patents so cross each other was the principal question of fact in controversy on the trial. Defendants did not adverse plaintiff's application for a patent.

This action involves the construction of certain sections of the act of Congress of May 10, 1872, relating to mineral lands of the United States, and particularly Sections 3, 6, 7, 14 and 16, which are here referred to by number as they appear in the United States Revised Statutes, to wit: Section 2322, which provides, in substance, that locators of mining locations hereto-

fore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on May 10, 1872, so long as they comply with the laws of the United States and with local regulations governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. Also Sections 2325 and 2326, which prescribe the manner in which patents may be obtained for lands containing valuable deposits, and for settling conflicting or adverse claims to any such locations. Also Section 2336, which provides that, "where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Also Section 2344, which provides that "nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws."

As we understand the views of counsel, it is contended on behalf of plaintiff that defendants, though they may have the prior location, yet not having adversed plaintiff's application for a patent, they have forfeited all their rights within the surface lines of plaintiff's location; while in behalf of defendants it is claimed that their discovery and location, being prior to that of plaintiff, and prior to the passage of the act of May 10, 1872, all their rights and interests are saved by Section 16 of said act: Section 2344 *supra*. This latter view seems to be supported by the opinion of the Supreme Court of California in the case of

Eclipse M. Co. v. Spring, 59 Cal. 304. But this court, in *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. Rep. 669, as well as on the former appeal in this case (*Lee v. Stahl*, 9 Colo. 208, 11 Pac. Rep. 77) has announced a doctrine somewhat different from either of the foregoing views. The former opinion in this case should now be regarded as "the law of the case," at least in this court, so far as it is applicable to the matters assigned for error on this appeal. We would not feel warranted in departing from it in determining the rights of the parties to this action. When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case, upon the same state of facts, is higher authority than the rule of *stare decisis*; it is generally regarded as *res judicata*, so far as the particular action is concerned: *Davidson v. Dallas*, 15 Cal. 75; *Table Mtn. Tunnel Co. v. Stranahan*, 21 Cal. 548. See opinion of Mr. Justice Belford in *Union M. Co. v. Bank*, 2 Colo. 266. According to such former opinion, as well as the opinion in the case of *Branagan v. Dulaney*, *supra*, defendants, having secured a patent for the Argentine location, if they can prove that the vein thereof actually intersects or crosses the Lone Tree vein, are entitled to follow the vein of the Argentine, and extract the ore therefrom within the side lines of their own location, and within the patented limits of the Lone Tree location, except within the space of actual intersection of the two veins, including a right of way through the Lone Tree vein, notwithstanding they did not adverse the plaintiff's application for a patent to the Lone Tree lode; but they can not maintain the right to the mineral within the space of lode intersection, nor other rights which they may have had by virtue of a prior location, because they did not assert and secure the same by adversary proceedings, as provided by the act of Congress; a failure so to assert such rights being deemed a waiver of them. Hence, if defendants have a true cross-vein, plaintiff can not maintain ejectment therefor, or otherwise restrain them from working the same, so long as they confine themselves thereto and keep within the side lines of their own location, and do not attempt to take the ore from the space of lode inter-

section with the Lone Tree; for to this extent defendants' cross-vein is excepted out of the grant, and is not lost by a failure to adverse plaintiff's application for a patent. But it is not the doctrine of this court that Section 2344 *ex proprio vigore*, operates to reserve out of the grant other rights acquired prior to the passage of the act of 1872, but that it secures the protection of such rights at the time of the issuance of the patent to those who avail themselves of the adverse procedure prescribed by the act itself. It is also claimed in behalf of defendants, that they are entitled to the same rights, without adverse, in case the veins unite, as in case of their actual crossing; and that Section 2336, *supra*, should be so construed. The argument is that the words "below the point of union," in said section, apply to veins uniting on the "strike," or on a horizontal extension, as well as to veins which unite on the "dip," or in their downward course; and that the word "below" should be construed as equivalent to "beyond." But this is not the ordinary signification of the word. Both words are of common use. Their meaning is plain, simple and well understood. It was well known at the date of the passage of the act that veins unite on their horizontal extension as well as in their downward course. Hence we would not be justified in assuming that Congress committed the palpable mistake of using the word "below," instead of the word "beyond," if they really intended, to give the preference to the prior locator in case of veins uniting on the "strike," as well as on the "dip," after the point of union is reached, without regard to adverse proceedings. The reason for the distinction is obvious. In controversies respecting the union of veins on their horizontal extension there will be conflict in their surface limits, but veins may unite in their downward course without any surface conflict. Hence, the union of veins of the former class being usually on or near the surface, the conflict will ordinarily be apparent at the time of the application for the patent; and it was evidently the design of the act of 1872 to have all conflicts, so far as practicable, settled by the issuance of the patent, through the adverse proceedings therein provided for. But in case of the union of veins in their downward course, such conflict might

not be foreseen or anticipated at the time of the application for the patent. Hence the provision in the latter case, that when the point of union is reached the oldest or prior location should take the vein below such point, including all the space of intersection.

There was no evidence or attempt to show that the Argentine and Lone Tree veins unite with each other in their downward course. The burden of proving that the two veins actually cross each other devolved upon the defendants; for, having failed to adverse plaintiff's application for a patent, in no other way could they show that they had prior rights within the limits of the Lone Tree patent which were excepted out of the grant; hence there was no error in the charge of the trial court in this regard. Neither was it technically erroneous to instruct the jury that their verdict should also be for the plaintiff in case they should find on all other points for the plaintiff, even if they should find that there was a crossing of the veins; for, if they should find on all other points for the plaintiff, that would include, a finding that defendants had ousted plaintiff from his own patented limits at some place other than where the Argentine vein actually crosses the same, or at the space of intersection, for purposes other than a mere right of way.

Error is assigned upon the following instruction given on the trial: "If the jury believe from the evidence that the Argentine lode runs westerly from its discovery into the Lone Tree lode, and merges into it, and does not cross it, but that the two lodes become one and the same lode, that in such case the oldest patent entry—that is, the Lone Tree, is entitled to the vein and ground as far as the apex of the vein is within its patent; and this is the case whether east of such point there are two lodes or only one lode." Upon the theory that only cross-veins and veins which unite in their downward course are excepted out of the grant in case of a failure to adverse, this instruction is not erroneous.

The trial court also charged the jury to the effect that the priority of discovery between the Argentine and the Lone Tree lodes had nothing whatever to do with their decision. This instruction was not error when we consider that de-

fendants' rights, if they have any, must be saved on the ground that they have a cross-vein which is excepted out of plaintiff's grant, and not on the ground of a prior location. The jury were instructed, in substance, that the crossing of lodes does not mean the crossing of two patents, but the actual crossing of the two veins themselves; and, further, that if they should find from the evidence that there is such an actual crossing, then the defendants are entitled to their own vein within the conflicting area of the two patents through the space of intersection; but that such a crossing would not entitle them to leave their own patent and follow the Lone Tree lode. They were also further instructed that, if they should find there was such a crossing, to render a special verdict to that effect, specifying the point of crossing. These instructions were in substantial conformity to the views of this court in the two opinions above cited. As the jury did not return such special verdict, specifying the point of crossing, we must assume that in their judgment the evidence did not warrant such a finding. Had the jury found that there was an actual crossing, and rendered a verdict accordingly, the judgment of the court would doubtless have been such as to protect the defendants in working their cross-vein in accordance with the law as heretofore laid down by this court. As the verdict was general for the plaintiff, *we see no error in the judgment, and it is accordingly affirmed.*

1. Where two veins unite on the dip the oldest location holds. *Champion Co. v. Cons. Wyoming Co.*, 16 M. R. 145.

2. A lode is whatever the miner can follow and find ore. *Burke v. McDonald*, 29 Pac. 98.

3. Instance of contract and conveyance settling cross-lode rights. *Coffey v. Emigh*, 25 Pac. 88; 15 Colo. 184.

LEWIS W. SMITH V. RICHARD J. BOLLES.

(132 United States, 125; 10 S. C. Rep. 39. Supreme Court, 1889.)

On action for deceit. In an action to recover damages which the plaintiff has suffered by reason of the purchase of stock in a corporation, which he was induced to purchase on the faith of false and fraudulent representations made by the defendant, the measure of damages is the loss which the plaintiff sustained by reason of those representations—such as the money which he paid out, and interest, and all outlays legitimately attributable to the defendant's fraudulent conduct; but it does not include the expected fruits of an unrealized speculation.

Remote Profits. In applying the general rule that "the damage to be recovered must always be the natural and proximate consequence of the act complained of," those results are to be considered proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract.

In error to the Circuit Court of the United States for the Northern District of Ohio.

Richard J. Bolles filed his petition against Lewis W. Smith on the 21st day of February, 1884, in the Circuit Court of the United States for the Northern District of Ohio, to recover damages for alleged fraudulent representations in the sale of shares of mining stock, in place of which an amended petition was substituted on the 2d day of March, 1886, by leave of court. The amended petition sets up five causes of action: *First.* That in the fall of 1879 defendant and one Joseph W. Haskins entered into a fraudulent combination to form an incorporated mining company, based upon alleged mining property in the territory of Arizona, and for the alleged purpose of mining silver ore therefrom, and milling the same for market. That the title to the property was claimed to be in Haskins. That Haskins and others organized said corporation under the laws of New York, by the name of "The Irene Mill & Mining Company," with a capital of \$2,000,000, divided into 100,000 shares of \$20 each. That Haskins took the whole of the stock, and paid for the same by transferring to the company

¹ *Tucker v. Parks*, 7 Colo. 62.

the alleged mining property, and apparently for the sum of \$2,000,000. That Haskins and defendant then represented that 60,000 shares of said stock were issued to or paid for by Haskins, and were deposited with the treasurer of the company to be sold to subscribers and purchasers, and the proceeds to be applied to the construction of a stamp-mill, to be connected with the supposed mining property, and for the purpose of further sinking the shaft and tunnel then in progress. That the defendant had, in connection with Haskins, some interest in the stock, the extent of which was then and is still unknown to plaintiff. That plaintiff was wholly ignorant of the value of the stock, and of the mining property on which it was supposed to be based, never having dealt in such stock or property. That in the month of February, 1880, the defendant applied to him to buy and subscribe for some of the stock, stating that he was interested in it, and that, before acquiring an interest, he had learned from Haskins the enormous value of the property, and to satisfy himself had gone to Arizona, and thoroughly examined it. That he then represented to plaintiff a variety of facts as existing in respect to the mine, making it of great value, which representations are set forth in detail; and that, having known the defendant for several years, and believing him to be a truthful and honest man, and without knowledge or suspicion that said representations were untrue, but believing and relying on the same, the plaintiff had, at the request of the defendant, in the month of February, 1880, agreed to buy of the defendant 4,000 shares of the stock, at \$1.50 per share, which contract was completed in the month of March, 1880, by the payment in full of the purchase price, to wit, \$6,000, to one H. J. Davis, who claimed to act as treasurer of the company, and from whom the plaintiff received certificates for the stock. Plaintiff then alleged that said representations were each and all false and fraudulent, specifically denying the truth of each of them, and averring that "said stock and mining property was then, and still is, wholly worthless, and that had the same been as represented by defendant it would have been worth at least ten dollars per share, and so plaintiff says that by reason of the premises he has sus-

tained damages to the amount of \$40,000." *Second.* That defendant made similar false and fraudulent representations to John H. Bolles, by which the latter was induced to purchase 2,000 shares of the stock at the price of \$1.50 per share, and was, by reason of the premises, damaged to the extent of \$6,000; and that John H. Bolles had transferred his claim to the plaintiff, who was entitled to recover of defendant said sum. *Third.* That defendant made similar false and fraudulent representations to L. W. Mars-teller, who was thereby induced to purchase 800 shares of said stock, at the price of \$2 per share, and was damaged by reason of the premises to the extent of \$2,000, and had transferred his claim to the plaintiff, who was therefore entitled to recover said sum of the defendant. *Fourth.* That the defendant had made similar false and fraudulent representations to Mrs. Mary Manchester, and induced her, in reliance thereon, to purchase 225 shares of the stock, at a cost (according to the original petition) of \$450, and she had incurred damages thereby to the extent of \$1,500. That this claim had been assigned to the plaintiff, who was entitled to recover said sum of the defendant. *Fifth.* That defendant made similar false and fraudulent representations to one John Van Gassbeck, who was induced thereby to purchase 2,500 shares of the stock at \$2 per share, making \$5,000, which he had paid to the defendant, and he was by reason of the premises damaged to the extent of \$10,000; and that Van Gassbeck had transferred this claim to the plaintiff, whereby the latter was entitled to recover said sum of the defendant.

Plaintiff further averred that the aggregate of said damages amounted to \$60,500, for which he prayed judgment.

Defendant answered plaintiff's petition, admitting the incorporation and organization of the "Irene Mill & Mining Company," but denying all and singular the remaining allegations of the petition, and further set up affirmatively the statute of limitations.

The second and fourth causes of action, as set forth in the original petition, founded on the claims of John H. Bolles and Mary Manchester, sought merely a rescission of the contracts, and to recover back all the money they had

respectively paid for shares of stock; but by the amended petition their causes of action were changed to counts for the recovery of damages resulting to said John H. and Mary, from the alleged false and fraudulent representations. The cause was tried by a jury, and resulted in a verdict for the plaintiff, assessing his damages at the sum of \$8,140, upon which, after a motion for a new trial had been made by the defendant, and overruled, judgment was rendered and the cause was then brought here on writ of error.

W. W. BOYNTON, J. C. HALE and E. H. FITCH, for plaintiff in error.

E. J. ESTEP, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

The bill of exceptions states that the court charged the jury, "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you."

In this there was error. The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false

and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery. Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages. "The damage to be recovered must always be the natural and proximate consequence of the act complained of," says Mr. Greenleaf (Vol. 2, Sec. 256); and "the test is," adds Chief Justice BEASLEY, in *Crater v. Binninger*, 33 N. J. Law, 513, "that those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract." In that case the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, which moneys were lost, less the value of the interest which the plaintiff retained in the property held by those associated in the speculation. And see *Horne v. Walton*, 117 Ill. 130, 141, 7 N. E. Rep. 100, 103; *Slingerland v. Bennett*, 66 N. Y. 611; *Schwabacker v. Riddle*, 84 Ill. 517; *Fitzsimmons v. Chapman*, 37 Mich. 139.

We regard the instructions of the court upon this subject

as so erroneous and misleading as to require a reversal of the judgment. The five causes of action covered the purchase of 9,525 shares of stock, for which \$16,050 in the aggregate had been paid. The plaintiff did not withdraw either of his five counts, for request the court to direct the jury to distinguish between them. The verdict was a general one for \$8,140, and, while it may be quite probable that the jury did in fact, as counsel for defendant in error contends, award to the plaintiff under his first cause of action the sum he had paid for the shares he had purchased himself, and interest, we can not hold this as matter of law to have been so, nor can we determine what influence the erroneous advice of the learned judge may have had upon the deliberations of the jury.

Other errors are assigned which we think it would subserve no useful purpose to review. They involve rulings the exceptions to which were not so clearly saved as might have been wished had the disposal of this case turned upon them, and which will not probably, in the care used upon another trial, be repeated precisely as now presented. For the error indicated the judgment is reversed, and the cause *remanded, with a direction to grant a new trial.*

1. Exemplary damages and counsel fees allowed against agent obtaining possession of principal's goods and converting them upon false representations. *Peckham Iron Co. v. Harper*, 41 Oh. St. 100.

2. In wilful trespass no allowance for expenses. *Patchen v. Keeley*, 19 Nev. 404; 14 Pac. 347.

3. Injuries to a mine, as such, must be specially declared for. *Id.*

4. Measure of damages is dependent, more or less, on the mood and conduct of defendant. *Cheesman v. Shreeve*, 40 Fed. 788.

5. Interest upon the cost of a silver mill may be taken as the equivalent of rental value. *New York Co. v. Fraser*, 180 U. S. 611.

WASHINGTON NATURAL GAS CO. V. JOHNSON ET AL.

(128 Pennsylvania State, 576; 16 Atlantic, 799. Supreme Court, 1889.)

Assignment of lease after covenant broken. The assignee of a lease containing covenant to commence a well within a time stated, is not liable for the breach when he took his assignment after such time had elapsed.

¹ **Payment conditioned on striking gas.** When a lease provided for the sinking of a well within a certain time, and the payment of a certain sum within a certain period after the completion of the well, provided gas was found: *Held*, that the breach was complete by failure to sink the well—but without ruling on the measure of damages.

Creditor can not retain conditional payment and avoid the condition. If, pending the adjustment of a disputed liability, the debtor transmit money to his creditor as a payment in full of the demand, the creditor may not receive and retain the money as a credit upon a larger sum claimed by him, without discharging the debtor as to the whole.

Error to Court of Common Pleas, Washington County.

Action by M. J. Johnson and others against the Washington Natural Gas Company to recover \$800 as the first year's rental for "the second well," in an oil and gas lease which provided "that, if gas is obtained in sufficient quantities, and utilized, the consideration in full to the" lessors "shall be \$800 for each and every well drilled on the premises herein described, per annum, payable within sixty days after completion of such well, and thereafter, yearly in advance." Defendants bring error.

G. D. PACKER and J. I. BROWNSON, JR., for plaintiff in error.

L. MCCARRELL, R. W. IRWIN, E. E. CRUMRINE, and BOYD CRUMRINE, for defendants in error.

WILLIAMS, J.

This action is brought to recover for a breach of cove-

¹ *Ray v. Hodge*, 15 M. R. 371.

nant contained in an oil lease dated August 5, 1885. By the terms of the lease, Guffy & Co., the lessees, acquired the exclusive right to drill and operate wells for oil and gas on about seventy-five acres of land for the term of twenty years. In consideration of this grant, they undertook to commence operations on the premises, and complete one well within six months from the date of the lease. They were also to commence a second well four months after the time for the completion of well No. 1. The royalty to be paid was fixed by the terms of the lease at one-fourth of all oil produced, if oil was found, and \$800 per annum for each gas well operated, if gas was found in sufficient quantities to be utilized. The lessees took possession, and drilled one well in accordance with their covenant, which produced gas in sufficient quantities to be utilized. Three months before the time for putting down the second well, Guffy & Co. assigned the lease to C. D. Robbins, who held it from the 18th March, 1886, till the 20th January, 1887, and then assigned to the Washington Natural Gas Company. The second well should have been drilled, allowing three months to be a reasonable time in which to complete it, during the time when Robbins was the holder of the lease. The action, however, is against the assignee of Robbins, whose title was acquired some two months after the time when the well should have been completed, and at least five months after it should have been begun.

The liability of the assignee was brought to the attention of the court by the sixth point submitted on the part of the defendant below, as follows: "It being a conceded fact that a reasonable time for drilling said second well had elapsed before defendant became assignee of the lease, the defendant can not be held liable for a failure to drill said well." This point was refused. The seventh point asked the further instruction that, "it being shown by the plaintiffs themselves that the covenant in the lease * * * to commence the second well * * * was broken before the defendant acquired any interest in the lease, the proper remedy for such breach was an action against the original lessee, or the holders of the lease at the time of the breach." This was also refused and the learned

judge told the jury in his general charge that the breach of the covenant to drill a second well was not complete until the end of sixty days after the well should have been finished, because that was the time when the rent for the second well would fall due. "The commencement of the breach," said the learned judge to the jury, "was the failure to begin a second well on or before October, 1886, and the consummation was in not paying the eight hundred dollars when it ought to have been paid had a paying well been struck." The answers to the points and the foregoing instructions are assigned for error.

The covenant sued on is as follows: "And it is further agreed the second well shall be commenced four months after May, 1886, the time stated for the completion of well No. 1." The plaintiffs allege a breach of this covenant, and state their cause of action to be that the defendant "has failed to commence a second well upon said leased premises within the time mentioned in said lease; to-wit, within four months from May 1, 1886, or at any other time." The instruction of the learned judge that a covenant to commence a well at a fixed time was only partly broken by a failure to commence it is not in harmony with the plaintiffs' claim, as stated in their *narr.*, nor is it justified by the terms of the covenant. If the well had been drilled at the proper time, the covenant would have been fully performed, though neither gas nor oil had been found, and in that event no rent would have been demandable. The duty to pay rent for the second well as for the first one was conditioned upon actual production, and it ceased when the production ceased, or when the quantity of gas was too small to be utilized. The object of the covenant was to secure the development of the lessors' land by the putting down of two wells upon it for which rent was to be paid if the wells were successful. The breach was complete when the lessee failed to drill as he had agreed. Loss of rents and profits might or might not follow, depending on the productiveness of the field. This subject might have been considered by the jury in fixing the damages after the plaintiffs' right to recover was settled, but had no relation whatever to the question on which the liability of the defendant depended.

Turning, then, to the question raised by the points, we find the facts to be as assumed therein, and the liability of the gas company to depend upon the extent to which the covenants of Guffy & Co. ran with the land. That they continued liable notwithstanding their assignment to Robbins is very clear. The covenant was their own, and their privity of contract with their lessors continued notwithstanding their assignment of the lease. Their assignee, Robbins, who was in possession when the time for performance arrived, was also liable because of the privity of estate which arose upon his acceptance of the assignment. Acquiring the leasehold estate by an assignment of the lease, he is fixed with notice of its covenants, and he takes the estate of his assignors *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. If he had assigned before the time for performance, his liability would have ceased with his title, and liability would have attached to his assignee by reason of privity of estate, and so on, *toties quoties*. Each successive assignee would be liable for covenants maturing while the title was held by him because of privity of estate, but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract relation with the lessor. While he holds the estate, and enjoys its benefits, he bears its burdens, but he lays down both the estate and its burdens by an assignment, even though, as is said in some of the cases, his assignment be to a beggar: *Negley v. Morgan*, 46 Pa. St. 281; *Borland's Appeal*, 66 Pa. St. 470.

It is clear, therefore, that, when Robbins made his assignment to the Washington Natural Gas Company, the time fixed in the lease for the sinking of the second well had gone by and the covenant was broken. Guffy & Co. were liable upon their contract because, although their assignment had divested them of the lease, it could not relieve them from their contracts. Robbins, who was the owner when the covenant matured, was liable because of the privity of estate, but the gas company had no relations with the lessor or the leasehold until after the covenant was broken. The covenant ran with the land until the breach. It then ceased to run, because it was turned into a cause of action.

The case of *The Bradford Oil Co. v. Blair*, 113 Pa. St. 83, 4 Atl. 218, has been cited as sustaining a contrary doctrine, but an examination of it will show that it is clearly distinguishable from this case.

The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair's farm at a time certain, and to "continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption." Two wells were completed, and were successful oil wells. The assignee of the lease owned adjoining lands upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and "without interruption." The obligation of a covenant to prosecute the business of developing the land of the lessor without delay and without interruption is a continuing one. The breach for which the Bradford Oil Company was held liable was not that of some previous holder of the title, but its own.

There is another reason for reversing this case brought to our attention by the eighth assignment of error. The check for \$650 sent by the treasurer of the gas company to the attorney of the lessors was expressly stated to be in full for the Johnson lease from May 1, 1887, to May 1, 1888. A receipt was returned for the amount, stating that it was received for rental of well No. 1 on Johnson lease. The treasurer promptly returned the receipt, saying "the \$650 was sent, and so stated, in full for Johnson lease," and requesting its return if not accepted as sent. It was not returned. The party paying money has the right to direct its appropriation. It was the plain duty of the lessor to accept the check for the purpose for which it was offered, or to return it. Attention was again drawn to the subject by the treasurer in a note dated 21st July, asking the return of the check unless accepted as in full payment of all rents due on the lease. The refusal to return it after this explicit direction ought to be regarded as an election to accept it

for the purpose for which it was offered, viz., as payment in full for all rents due upon the lease.

Judgment reversed.

1. Where natural gas was found by lessee for oil the lessee was held entitled to it. *Wood County Co. v. West Va. Trans. Co.*, 28 W. Va. 210; 57 Amer. R. 659.

2. Contract based on promise of supply of natural gas to steel works held no defense to purchase money. *Reed v. Raymond*, 37 Fed. 186.

3. A natural gas company may be held for negligence in allowing destruction of prior fresh water wells by salt water from its drilled hole. *Collins v. Chartiers Valley Co.*, 21 Atl. 147; 139 Pa. St. 111.

4. Where lessor of land let to sink gas wells, reserves certain ground around buildings, etc., such reservation is intended as a "protection" to the lessee and the lessor can not allow a third party to bore on such reserve. *Westmoreland Co. v. DeWitt*, 18 Atl. 724.

5. Defendants agreed to purchase as much coal as they should require for their mill. Afterward they substituted natural gas for fuel: *Held*, that they were not bound to take coal from plaintiff. *Cannonsburg I. Co. v. McKeever*, 16 Atl. 97.

6. Finding gas, under an oil lease, does not save from forfeiture under the clause that if oil were not found the lease should become void. "It would be a clear perversion of language to hold that 'gas' and 'oil' are synonymous terms." *Truby v. Palmer*, 6 Atl. 74. "Gas" is not "oil" nor is "water" "ice" and the decision may be right, but such truisms do not satisfy the legal mind.—R. S. M.

7. The question whether natural gas is a "volatile substance" under a lease for petroleum "or other volatile substances" makes an issue of fact. *Ford v. Buchanan*, 2 Atl. 339.

THE SILVER CORD COMBINATION MINING CO. v. McDONALD.

(14 Colorado, 191. Supreme Court, 1890.)

Running cars during recess for men to occupy the gangway. Where a miner has worked through a long incline by tramway and cars, and it was an established rule of the company that after tally sounded, and at 5:23 p. m., cars should cease running, giving the workmen the next seven minutes to get to top, and in violation of this rule a car was allowed to run after 5:23, which caught a miner on his way up—a case of negligence is made out.

¹ **Rule habitually disregarded.** The rule was to quit after signal for tally, but the signal was often omitted and the men were expected to quit at that hour whether signal given or not. *Held*, that the permitted non-observance of the rule made its violation by the men no defense to the company.

A company adopting rules should conform to them, and if it fails to observe them it is liable for the consequences.

Want of presence of mind in the person is no excuse to the defendant, by whose negligence he is placed in the position of peril.

Appeal from District Court of Lake County.

Mr. CLINTON REED, for appellant.

Messrs. TAYLOR & ASHTON, for appellee.

RICHMOND, O.

Appellee, plaintiff below, brought this action to recover damages for injuries alleged to have been sustained by him while in the employ of the defendant company. The cause was tried to a jury, and verdict rendered in favor of plaintiff for the sum of \$2,250. Motion for a new trial overruled. Appeal prayed and allowed. The assignment of errors are to instructions given and refused, and in rendering judgment for plaintiff upon the verdict, and that damages are excessive.

The facts, in substance, are that appellant was a corporation engaged in mining at Leadville, employing upward

¹ *Marx v. Travelers Ins. Co.*, 89 Fed. 821.

of one hundred men, who worked the mine through an incline about eight hundred and thirty-five feet in length. Iron rails were laid along the incline, over which the company drew its cars. Along this incline, on one side, was a passage-way over which was constructed a plank walk. About seven hundred feet down the incline was a station called "No. 2." It was a rule of the company that after "tally," which was expected to occur at twenty-three minutes past 5 o'clock, the cars should cease to run up and down the incline. Miners were allowed seven minutes to reach the surface after tally. An air-pipe extended from the surface to station No. 2, and the man at the top, or foreman, at twenty-three minutes past 5 o'clock, rapped on this air-pipe, or was supposed to do so. This was called "tally." The foreman, who had charge of the mine, and who, as the evidence shows, had authority to hire and discharge men, instructed the man at station No. 2, Thomas McNicholas, that when this signal was not given from the top he was to tally the men, anyhow, at twenty-three minutes past 5 o'clock.

On the day the injuries were received, plaintiff, in passing up the incline, was met by a car going down, and in the excitement attempted to jump across the track at a place, as he thought, of greater safety, and in so doing received the injuries for which he seeks to recover damages in this action.

It is contended by appellant that the rule of the company was that none of the employes engaged in the mine should attempt the ascent until tally had been given by rapping on the pipe; that this rule was absolute; and that on the day the injuries were received the signal had not been given; therefore the plaintiff, in attempting the ascent of the incline, was violating the rule of the company—consequently, was guilty of contributory negligence. On the other hand, the plaintiff contends that the rule was not absolute, in fact was frequently violated by the defendant, and that the injuries were the result of its negligence in sending a car down the incline during the seven minutes allowed to the miners to reach the surface, and that on the day the injuries were received the man (Thomas McNicholas) stationed at

station No. 2 gave the tally to the men before they attempted to ascend the incline.

The defense relied upon by appellant is that there was contributory negligence on the part of plaintiff in violating the rule of the company. It is insisted in the argument of counsel for appellant that no testimony appears showing that a tally had been given before plaintiff, with others, attempted to ascend the incline.

This position assumed in the argument is not supported by the record furnished by appellant. Some dispute arose between counsel for the respective parties as to the testimony of Thomas McNicholas, a witness sworn on behalf of defendant; and, in order that this court might be fully informed of what McNicholas did swear to, appellant furnished a complete abstract of his testimony. From that it appears that McNicholas testified as follows:

“Question. Now, what do you know? Explain to the jury about quitting time of the men, and about the rules of the company—when they should quit, and what signal was given them to quit. *Answer.* The men had orders that they should have seven minutes—that is, from twenty-three minutes after five—to go from No. 2 station, where I was stationed, to the top, before the whistle blew. They had a signal on top—that the engineer on top would rap at twenty-three minutes after five, and if he did not, the top man there would rap on the air-pipe. I think it was seven minutes for tally. If that was not rapped—the foreman of the mine told me that, when that was not rapped in time, as long as I had my watch, and knowed the time, to tally the men, and let them go to the top. *Q.* How was it on this day that the accident happened? *A.* This day, I do not think the pipe was rapped at the regular time. If there were any men there at that time, I tallied them. I do not think there was many there. *Q.* And then, when you were waiting there for the drop to come down, to send another to the surface, had the tally commenced to run—that is, the seven minutes? Was it tally at that time? *A.* It was. *Cross-examination.* *Q.* You say you gave the tally to some of the men there that night? *A.* I gave the tally to all of them that was there. *Q.* You gave to all that were

there? A. Yes, sir; I do not remember whether the plaintiff was there or not. Q. Now, did you notify any of them that there was a train going down the incline at the time they started up, or at the time they were starting up? A. I believe not. Q. Did you ever tally the men before the time for tally came? A. No, sir. Q. And then the men that you tallied this evening were started at the proper time, were they? A. Yes, sir."

This witness gave further testimony to the same import; but it is unnecessary for us to quote more, as sufficient appears from the above to show that plaintiff was in the incline, on his way to the surface, under the rule of the company, as understood by this witness.

Several witnesses testify in behalf of plaintiff, and support the testimony of McNicholas as to the time, etc. Plaintiff testified that "the regulations of the company was that we were allowed seven minutes to come out; that they were supposed to be on top at 5:30. They would sometimes tap on the pipe when it was time for us to come up. They did not do it always. The time I was hurt, I was about two hundred or two hundred and fifty feet from the mouth of the incline. It was twenty-three minutes past five when we started up the incline."

It may be true, as claimed by the attorney for appellant, that the rule was that tally should not be given until the signal was rapped by some person on the surface of the mine. Yet it is equally true that the company did not at all times observe the rule. At least, it can consistently be claimed that ample evidence appears in the record to warrant the belief that this rule was not strictly adhered to. Undoubtedly the company sought to adopt proper rules and regulations concerning the time when the miners should have a right of way through the incline. Having adopted them, it should have conformed to them; and, failing to do so, it must be held responsible for the consequences resulting from a departure, unless contributory negligence on the part of plaintiff is established: *Railroad Company v. George*, 19 Ill. 510.

Besides, under the circumstances as detailed by all of the witnesses in the case, we think such a rule as is here con-

tended was in force by appellant, should have been strictly enforced. No departure from it should have been tolerated. It was necessary to the welfare of the miners. McNicholas, at station No. 2, could not possibly know when the cars would be sent down the incline by the engineer at the top; and allowing him to give the tally, in violation of the rule, without such knowledge, was subjecting the miners to an extraordinary risk, and was an act of negligence on the part of the company.

In general, questions of negligence and contributory negligence are questions of fact, to be determined by the jury from the evidence and circumstances of the case, under suitable instructions. They can not ordinarily be decided by the court. Hence, it was the province of the jury to pass upon those questions in this case: *Railway Co. v. Ward*, 4 Colo. 30; 2 Thomp. Trial, § 1681; *Railway Co. v. Harper*, 26 Ill. App. 621.

Counsel for appellant urges that plaintiff, in attempting to cross the track at the time the car was descending the incline, was guilty of contributory negligence, and therefore can not recover. This question was fairly submitted to the jury by an instruction, and resolved by them favorably to plaintiff. Similar positions and circumstances have several times been presented for judicial investigation as involving the question of contributory negligence, and, it must be admitted, have been variously construed. But the rule which commends itself to our approbation, as resting on sound principles of humanity, is to the effect that "a party giving another a reasonable cause for alarm can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm, when he is guilty of negligence or violation of law contributing to the injury." *Coal Co. v. Healer*, 84 Ill. 126; *Collins v. Davidson*, 19 Fed. 83.

It is urged that the court erred in refusing to give the eleventh and twelfth instructions asked for by appellant. The eleventh instruction was fully covered by the fifth and eighth instructions given; and, indeed, we are inclined to the opinion that the language used by the court was

decidedly more favorable to the defendant than that embraced in the eleventh instruction as asked, and, under the rule laid down in *McKee v. Bassick Co.*, 8 Colo. 392, it was not error to refuse to give it.

In refusing to give the twelfth instruction as asked, there was no error, for the reason that there was no testimony offered on the part of defendant tending to prove that the injuries for which recovery was sought occurred through the negligence of a servant of the defendant; nor was such a claim, so far as the record discloses, interposed during the trial of the cause. The defendant relied at the trial, as in this court, upon the ground of plaintiff's contributory negligence as its defense.

It is also contended that the court erred in instructing the jury that it is not negligence to commit an error under the influence of fear produced by the appearance of sudden danger, and also that there was error in instructing to the effect that if the defendant, through its negligence, put the plaintiff in a position of immediate danger, real or apparent, and that plaintiff, through a sudden impulse of fear, attempted to escape the danger, and in so doing actually received the injury he was attempting to escape, then he may recover. We can not agree that these objections are well taken. On the contrary, we think the instructions substantially correct, under the evidence and circumstances of the case: *Coal Co. v. Healer, supra*.

As to the question of damages, the jury were fairly and properly instructed. Ample testimony appears to show that the injuries of plaintiff were permanent; and it is utterly impossible for us to say, under the circumstances, that plaintiff, thus permanently injured, was not entitled to the amount mentioned in the verdict of the jury.

True it is that it was a question between the physicians who testified on the part of plaintiff and defendant as to whether the injuries received were of a permanent character. But it is fair to assume that the jury found that the injuries were of that character, and upon such finding based the amount of damages. The witnesses were before them, and apparently without any interest, directly or in-

directly, in the result of the cause. Each were equally entitled to credit; and in this case, "when the doctors disagree," we think it was for the jury to decide. The instructions of the court were full, and in keeping with the doctrine as announced in *Wells v. Coe*, 9 Colo. 159.

We are therefore unable to escape the conclusion that the cause was fairly and impartially tried, the jury correctly instructed upon the law of the case, and that the evidence is sufficient to support the verdict.

The judgment should be affirmed.

PATTISON and REED, CC., concur.

Per Curiam. For the reasons stated in the foregoing opinion the judgment is affirmed.

Affirmed.

1. It is error to refuse to charge that recovery can be had without proof of the neglect. *Wiener v. Hammell*, 14 N. Y. Sup. 365.

2. Where the injury is chargeable in part to the master and in part to a co-employee, the master may be held. *Myers v. Hudson Co.*, 150 Mass. 125.

3. Degree of care required of the master fully stated. *Southwest Imp. Co. v. Smith*, 85 Va. 306; 17 Amer. St. Rep. 59.

4. A master is liable for employing insufficient help. *Id.* And for not employing proper brakes to tramcars. *Id.* Fright excuses rash acts in cases of sudden peril. *Id.*

5. Defendants held for accident from explosion of caps. *Rillston v. Mather*, 44 Fed. 743.

6. Defendant held for allowing slack-dump to burn unfenced. *McDonald v. U. P. R. R.*, 43 Fed. 579.

7. Within a quarter of an hour after a misfire of an extra heavy blast a laborer was ordered back to work by the foreman. Held, sufficient evidence of negligence to bar a non-suit. *Berg v. Boston M. Co.*, 29 Pac. 545.

8. A child under fourteen is *prima facie* incapable of contributory negligence; but the negligence of the father is a defense. *Pratt Coal Co. v. Brawley*, 8 So. 555.

9. The court will not take judicial notice that coal dust is an explosive element in a coal mine. *Cherokee Co. v. Wilson*, 28 Pac. 178.

10. Evidence of improper planning of a mine and want of proper barricades is inadmissible in action for negligence in allowing explosives to accumulate. *Id.*

11. Whether a miner has waited a sufficient time after a misfire or

is guilty of contributory negligence in returning too soon, is a question for the jury. *Davis v. Graham*, 29 Pac. 1007.

12. Where a miner knows defects and continues to serve he takes the risk after reasonable time elapses for his employer to keep promise to repair. *Davis v. Graham*, 29 Pac. 1007; *Eureka Co. v. Bass*, 8 So. 216.

13. Foreman is a fellow-servant. *Stephens v. Doe*, 78 Cal. 26.

14. For injuries to a boy of ten the defendant was held responsible, the boy being outside of his regular employment while obeying orders of another employe. *Brazil Coal Co. v. Gaffney*, 119 Ind. 455.

15. Master is not liable for injury caused by act of co-employe though higher in authority than the injured employe, nor for obedience to authority exercised without proof of right to use such authority. *Wilson v. Dunreath Q. Co.*, 77 Iowa, 429.

16. Employe assumes risk only of known dangers. He is not called upon to make strict examination of the hoisting rig. *Myers v. Hudson Iron Co.*, 150 Mass. 125.

17. A master is not bound to use the latest and safest machinery. *Lehigh Coal Co. v. Hayes*, 128 Pa. St. 294.

18. An infant of fourteen must avoid visible dangers. *Id.*

19. A miner takes the ordinary risks. *Southwest Imp. Co. v. Smith*, 85 Va. 306; 7 S. E. 365; *Drew v. Gaylord Co.*, 4 Atl. 214.

20. Lessor is not liable for lessee's negligence. *Smith v. Belshaw*, 26 Pac. 834.

21. Consideration of reasonable time to wait for blast and evidence to prove what is reasonable time. *Eureka Co. v. Bass*, 8 So. 216.

22. Notice of defect in fuse to superintendent is notice to the company. *Id.*

RICE ET AL. v. EGE ET AL.

(43 Federal Reporter, 661. In the Circuit Court of the United States, Northern District of New York, 1890.)

Acquiescence in irregularly executed contracts. When an equitable arrangement has been made dividing or exchanging interests in oil leases between parties jointly owning in the same, reduced to writing, signed by one for all, and acquiesced in by all—such agreement will be upheld against the proper parties the same as if they had attached their signatures.

¹ **Sufficient proof of "non-productive" well.** Where a certain payment was to be made in case certain wells when sunk should be found unproductive or fail to pay, it is sufficient evidence of such condition to show that the wells were bored through the oil-producing stratum without showing more than a trace of oil. It is not necessary that the experiment of shooting the same should be tried.

At law. Tried by the court, a jury having been waived.

HAMILTON WARD, for plaintiffs.

CHARLES H. BROWN and JOHN E. BRANDEGEE, for defendant Treat.

GEORGE L. ROBERTS, for other defendants.

COXE, J.

Many of the facts appear in the opinion rendered upon the motion to amend the answer (42 Fed. 658). These need not again be stated. Upon the merits, but two questions are presented: *First*, did the defendants enter into the agreement set out in the complaint? *Second*, were the wells on the Nelson and Dodson farms drilled to a sufficient depth to determine that they were unproductive?

Upon the first of these questions the issue, as before determined, is a narrow one. The answer admits that the defendants were interested with the plaintiffs in a large number of oil leases in Allegany county; that on July 1, 1881, a settlement was had, and a division of the leases was

¹ *Gillespie Co. v. Wilson*, 16 Atl. 86.

made between the plaintiffs and the defendants, and, recognizing the binding force of the agreement upon both parties, and relying upon its provisions for their exculpation, the defendants allege that pursuant to its provisions they were entitled to notice, and an opportunity to examine the Nelson and Dodson wells, in order that they might satisfy themselves of their unproductiveness. It is true that the answer avers "that said agreement was signed by J. A. Ege, and that the defendants H. B. Huff and M. C. Treat never signed said agreement," but this allegation adds no new element to the discussion. The plaintiffs do not contend that Treat and Huff, with their own hands, affixed their signatures to the paper. In fact the agreement on its face shows that they did not. The contention of the plaintiffs is that Ege, as the representative of the other defendants and with authority from them, negotiated the agreement with Norton, who had like authority to act for the plaintiffs. This statement of the situation seems nowhere to be denied in the answer and is not now disputed by Ege or Huff. But were the question of Ege's authority an open one a similar conclusion must be reached. The contract of July 1st was an equitable one. In the division of the leases the most valuable, the Richardson lease, was assigned to the defendants. Every consideration of fairness required that the plaintiffs should receive property of equal value, or at least that the expense of testing it should not fall entirely upon them. For his interest alone in the Richardson lease the defendant Treat received \$1,292.50. On the other hand the testimony fails to show that the leases assigned to the plaintiffs had any value at all. Besides, the plaintiffs were liable to lose, and they have since lost, the large sum expended in drilling the two wells in question. The contract being a fair one to all the defendants, Treat included, there is no room for the suspicion that its terms were concealed from him. Were the positive testimony of Treat's participation in all of these transactions eliminated from the case, the presumption that he had knowledge of them is irresistible. The defendants lived together in the same town. Treat had dealt in oil for twenty years. He was no novice. His place of business was directly across the street from Ege's bank. Their relations were intimate.

The evidence shows many joint ventures. They were in consultation regarding their oil interests immediately subsequent to the transaction of July 1st, and thereafter they bought property jointly and gave their joint note in payment, taking the title, however, in Ege's name alone. On the 1st day of July, the same day that the agreement in question was made, the plaintiffs assigned to the defendants, Treat being named in the assignment, all their interest in the Richardson lease, except ten acres taken from the west side of the property. This assignment was recorded July 25, 1881. On the 13th of July, 1881, Treat assigned all his interest in the Richardson lease, and other leases, to Huff and Ege for \$1,292.50; but he testifies that at that time he had ascertained, from recent developments, that the Richardson lease was the only one of value. On the 20th of July, 1882, Huff and Ege assigned to John Coast & Sons and H. and W. W. Rice their interest in the Richardson lease covering 46½ acres of land. As the original lease was for 57 acres, this assignment, evidently, did not cover the 10 acres reserved by the assignment of July 1, 1881. On the trial Treat produced the original Richardson lease, the assignment by the plaintiffs to the defendants of July 1st, and his assignment to Ege and Huff. The fact that Ege delivered the assignment of the Richardson lease to Treat is persuasive evidence that the latter knew of the assignment. The evidence regarding the 10 acres is unsatisfactory and obscure. It is difficult to determine from the proof in whom the title to the 10 acres vested after the settlement of July 1st, and there is nothing authentic to show who first conveyed this property after that settlement. No written assignment or conveyance of the property has been introduced in evidence. The accounts of its disposition are not in harmony, the evidence leaving the matter very much in doubt. It is entirely clear, however, that the defendant Treat never obtained title to the 10 acres until after his assignment of July 13, 1881, to Huff and Ege. He swears that he obtained the assignment of the 10 acres between the 15th and 30th of July, 1881. No one pretends that it was prior to July 13th. It seems, therefore, impossible to account for his receipt of nearly \$1,300, except upon the theory of the

settlement of July 1st. He certainly knew that if this 46 acres was owned by eight persons instead of three, \$1,300 was too large a sum for one of them to receive for his interest. And it can hardly be insisted that this sum covered the other leases, for he swears that before that time the parties had ascertained that there was no value to any of the leases except the Richardson lease. The impression derived from all these facts is that Treat could not have been ignorant of the transactions carried on for his benefit and in his name. He must have known of them, and, had they been unauthorized there would have been some evidence of renunciation or dissatisfaction on his part. But in addition to these cogent inferences the record contains positive testimony that Ege's authority from Treat was ample, besides evidence from Ege, and others, that Treat not only had knowledge of Ege's acts but subsequently ratified and confirmed them. Treat denies this, but in many important instances his denial consists merely in a failure to recollect. The defendants must, therefore, be held to the contract for the following reasons: *First*, the answer practically admits that they executed it. *Second*, the presumption is strong that Treat must have known of its existence and assented to its terms. *Third*, the preponderance of testimony establishes Ege's authority to make the contract. *Fourth*, Treat subsequently ratified and confirmed it.

Upon the remaining question the proof, establishing the unproductiveness of the wells, is clear. The character and extent of the test required must be measured by the contract and not by the opinion of witnesses. The contract provides for the payment of \$1,000 if the Dodson and Nelson wells "prove to be unproductive as oil wells, or not paying wells, viz.: wells in which oil is produced in paying quantities." If the testimony establishes the proposition that the plaintiffs pushed their investigations sufficiently to show that neither the Nelson nor Dodson well was one in which oil could be produced in paying quantities they are entitled to recover. Their right can not be defeated by proof that a trace of oil was discovered, or even by proof that one of the wells might be made to produce a few barrels,

for such production was not sufficient to make it a paying well. The Nelson well was put down 1,600 feet; the Dodson well 1,377 feet. Oil in Allegany county is found, if at all, in the third sand. Both of these wells were drilled through the third sand and little, if any, oil was discovered. Subsequent developments still further demonstrated their unproductiveness. They are surrounded by a circle of dry holes. No oil has been found in their vicinity. The plaintiffs are criticised because the wells "were not shot, torpedoed or tubed," but it would seem that it is not necessary to do this unless the drilling shows some promise of oil. A torpedo may make oil flow more freely, but it will not produce oil from barren sand. There was no possible motive for the plaintiffs to omit anything required to make the wells a success. It was manifestly for their interest that the wells should pay. There is no direct proof as to the amount agreed to be paid for drilling the two wells, but if it were at the rate which the evidence shows was paid for similar wells in Allegany county the plaintiffs were obligated to pay nearly \$3,000. The comparatively small sum which they were to receive from the defendants in case the wells proved unproductive was no inducement to them to stop the work until every reasonable test had been made. Every incentive was in this direction. If the wells proved successful it meant a fortune to the plaintiffs. If they failed, it meant a large loss even after the \$1,000 had been paid by the defendants. I am satisfied that the plaintiffs did all that the agreement required, and that nothing which they could have done would have developed oil in paying quantities in either of the wells in question. *It follows that the plaintiffs are entitled to the judgment demanded in the complaint, with interest and costs.*

1. Action against warehouseman for leakage. *Baltimore E. R. v. Schumacker*, 29 Md. 168; 96 Am. Dec. 510.

2. Covenant to bore runs with the land; damages for not securing flowing oil. *Bradford Co. v. Blair*, 118 Pa. St. 83; 57 Amer. Rep. 442.

OMAHA & GRANT SMELTING & REFINING CO. ET AL. V.
TABOR ET AL.

(18 Colorado, 41; 21 Pac. Rep. 925; 16 Amer. St. Rep. 185. Supreme Court, 1889.)

Title in third party. In an action for the conversion of ore taken from plaintiff's mine, justification not being pleaded, evidence of title in a third person is inadmissible.

Locator a trespasser after entry by adverse party. An entry made on public mineral land is, at most, but an entry under license of the government, and a subsequent sale to another person by the government, and the issue of a receiver's receipt for the price thereof so divests the government of title that the license is *eo instanti* revoked, and the licensee can not set up his previous possession as adverse.

¹ **A purchaser of ore taken from a mine by a trespasser is guilty of conversion, though ignorant of the seller's want of title.**

The measure of damages for such conversion is the value of the ore sold, less the cost of raising it from the mine after it was broken, and hauling to defendant's place of business.

License by one co-tenant. A license to dig ore in a mine given by one tenant in common extends only to his own interest therein.

Insufficient license. Evidence that a mine-owner, being informed that persons had entered on a mining claim conflicting with his, under order of court, and were taking his ore, consented that another person should join them, does not establish a license to those already engaged in mining there.

Idem. It is proper to charge with reference to such alleged license that the owner must have consented that the persons claiming as licensees should enter through their own mine and take ore from his mine.

Parol proof of reserving possession after deed delivered. Under Gen. St. Colo., C. 18, Sec. 9, providing that in the absence of an inconsistent provision in a deed it will carry the right to immediate possession of the land therein conveyed, parol evidence of an agreement that possession should not pass until the purchase money was fully paid is inadmissible.

Use of pleadings as evidence. The fact that the plaintiffs, in an action for converting ore taken from their mine, were not the owners of the whole mine, can not be proved by the introduction of a complaint signed and verified by an agent of part of plaintiffs and another party, in a suit to enjoin the same defendants from trespassing on the mine, though such complaint is admissible to impeach the testimony of the agent, if inconsistent therewith.

¹ Not so liable when ore taken in good faith under claim and color of title. *National Co. v. Weston*, 15 Atl. 569; *Brown v. Caldwell*, 12 M. R. 674; *Smith v. Idaho Q. M. Co.*, 11 Pac. 878; *Mather v. Trinity Church*, 14 M. R. 472.

The fact of agency can not be proved by the declarations of the alleged agent alone.

Commissioners' decision. Appeal from District Court, Lake County.

Two suits, in the nature of actions in trover, brought by Horace A. W. Tabor, David H. Moffatt, Jacob J. B. Du Bois, James G. Blaine, and Jerome B. Chaffee—the first, against Eddy, James and Grant, the second against the Omaha & Grant Smelting & Refining Company, in which it appears the business of the former defendants was merged.

Plaintiffs alleged that they, with Charles E. Rider, were the owners and in the possession of the mine in the County of Lake known as the "Maid of Erin Lode," and as survey "Lot No. 568," and "Mineral Entry No. 384," from the 1st day of January, 1882, until the 11th of October, 1883. That between the 3d of July and the 31st of August, 1883, Thomas Ovens, Stanley G. Wight, and others wrongfully entered upon the property, and mined and took out a large quantity of valuable ore, and sold the same to the defendants, who converted it to their own use; and that the ore so mined, sold, and purchased by the defendants was of the value of \$25,000 over and above the cost of mining, raising, hauling and treating. That about the 9th day of March, 1886, the plaintiff Jerome B. Chaffee died, and David H. Moffatt became executor. That on or about the 20th of November, 1885, Charles E. Rider sold and transferred to David H. Moffatt his cause or causes of action in the premises, and that the defendants mixed and confused the ores of plaintiffs with other ores, destroyed their identity, and sold and converted them into money. Plaintiffs pray judgment for \$25,000, and interest. Defendants answer, denying all the allegations in the complaint, except the allegation of sale and assignment by Rider to Moffatt, in regard to which they say they are not informed, and the allegation that defendant had not paid plaintiffs for the ore, which is admitted. For further defense, defendants allege that, at the time of the alleged entry and wrongful taking of ore, Stanley G. Wight, Jervis Joslin, Chester B. Bullock, Boyd Park, A. W. Rucker, and

—— Rucker were the owners and in the possession of the Vanderbilt lode mining claim, which conflicted with and embraced a part of the Maid of Erin claim. That the territory in conflict was in litigation between the respective parties. That several actions at law and equity concerning it were pending and undetermined. That at the dates mentioned in the complaint Wight and others were mining and taking ores from the Vanderbilt claim, and from that part in conflict with the Maid of Erin. That these facts were unknown to defendants; and that the ore so taken, or a part of it, was sold and delivered to the defendant at its smelting works in Leadville, as ore from the Vanderbilt lode, and purchased by defendants in regular course of business. That long after the purchase of the ore by defendants they were informed that the ore was taken from the ground in dispute. Defendants further say, in answer, that some time during August or September, 1883, they did purchase ores belonging to Wight, Rucker, and others which were known as and called "Vanderbilt Ores," which as defendants believe were taken from the Vanderbilt claim, of which the said Wight and others were the owners and claimants, and in possession under claim and color of title.

Plaintiffs, in reply, deny that Wight and others were the owners of any part of the Vanderbilt claim in conflict with the Maid of Erin claim; deny that any part of the Vanderbilt claim conflicted; and allege that prior to the date mentioned the government of the United States had sold to the plaintiffs Tabor and Du Bois the Maid of Erin claim, and given a receiver's receipt for the same from the land-office at Leadville; and aver that Ovens and Wight wrongfully went into a portion of the ground described in the complaint while plaintiffs were in possession of it, and mined and carried away the ore, which was the same ore mentioned in defendants' answer; deny that Ovens and Wight had any title to the ground from which ore was taken, and aver that all the possession they had was wrongful and illegal and temporary, for the purpose of obtaining the ore; that the entry of Ovens and Wight was through a shaft on the Big Chief claim, not owned by either party to the controversy, and that from such shaft

they worked over the boundary into plaintiffs' property; deny that defendants did not know that Ovens and Wight were taking the ore from plaintiffs' ground; and aver full notice and knowledge of the fact.

The two suits were consolidated for the purpose of the trial. The venue was changed to Lake County; the cause tried before the court and a jury, April 15, 1888; verdict for plaintiffs against Eddy, James, and Grant for \$3,990.45, and against the Omaha & Grant Smelting & Refining Company for \$14,397.67. There are sixty-one assignments of error. Of these, thirty-eight are to the ruling of the court in admitting and rejecting testimony; twenty-two (being those from thirty-nine to sixty, both inclusive) are to the rulings of the court in giving and refusing the instructions asked; the sixty-first and last is to the refusal of the court to grant a new trial. The other facts necessary to a proper understanding of the case necessarily appear in the opinion.

PATTERSON & THOMAS, for appellant.

WOLCOTT & VAILL, J. B. BISSELL, and L. C. ROCKWELL, for appellees.

REED, C. (after stating the facts as above).

The first fifteen and the eighteenth errors assigned are to the ruling of the court on the cross-examination of plaintiffs' witness O. H. Harker.

Counsel in their argument for appellants say: "The defendants sought to show by cross-examination of the plaintiffs' witnesses that, at the time of the commission of the trespasses complained of, the Maid of Erin mine was owned by the Henriett Mining & Smelting Company and J. B. Du Bois, and that the original trespassers were enjoined at the suit of these parties by proper proceedings instituted for that purpose, but they were not permitted to do so." It appears that counsel for appellants (defendants below) upon the trial attempted, on cross-examination of the witness, to show that the plaintiff Du Bois owned one-half of the Maid of Erin property, and the Henriett Company the other half, and

that the other plaintiffs were not owners, by showing that the witness had so stated in a legal document signed and verified by him as manager and agent in some former proceeding concerning the property, in which case an injunction was issued to restrain a trespass upon the Maid of Erin claim upon the complaint so signed and verified; but the court would not permit it to be done. An examination of the questions asked the witness, which the court did not permit him to answer, will show that none of the testimony sought went to any issue in the case, was not directed to anything in his direct testimony, and was not legitimate cross-examination. Many of the questions were in regard to facts that could only have been proved by production of records or documents. Some of the questions were in regard to suits at law and proceedings where there is nothing in the record to show he in any way participated or of which he had any knowledge; and all the testimony sought, in our view of the case, was immaterial, except in so far as it tended to discredit him or weaken his testimony by showing that his acts or declarations on previous occasions were at variance and inconsistent with his testimony at that time. This counsel had a right to do by introducing the records or documents, and asking him in regard to oral statements. It appears that in the course of the trial the papers executed by the witness, to which his attention was called, were admitted in evidence for the purpose of impeachment—the only legitimate purpose they could serve.

It is clear that the title of the Henriett Company to one-half of the Maid of Erin claim could not have been established by parol statements, or the acts of an agent in verifying papers where the facts were so stated. Counsel say this was one purpose for which the evidence was sought to be elicited on cross-examination. Had it been proper cross-examination, and directed to an issue, it was incompetent for the declared purposes for which it was sought. The agency of the witness had not been established by any testimony but his own. He stated under oath at the time suit was brought that he was the manager and agent of the Henriett Company. This was insufficient. An agency can not be established by his own declarations: *Harker v. De-*

ment, 9 Gill, 16; *James v. Stookey*, 1 Wash. C. C. 330. If an agency had been proved, it was that at the time of verifying the papers he was the manager and agent of the Henriett Company; and his sworn statement that he was such agent, and that his principal owned one-half of defendants' claim, could not be binding upon, or in any way affect, the plaintiffs in this action. And although he was the agent of plaintiffs, in charge of their work in the Maid of Erin, no statement, no matter how solemnly made by him as the agent of the Henriett Company, in favor of such company, or against the title of plaintiffs, could affect either, much less conclude and estop the plaintiffs from asserting the contrary, as is urged by counsel. There was no plea of property in the Henriett Company, and of entry and justification under such a title. The defendant in this case can not set up a title of a third person in defense, unless he in some manner connects himself with it: *Duncan v. Spear*, 11 Wend. 54; *Weymouth v. Railroad Co.*, 17 Wis. 567; *Harker v. Dement*, 9 Gill, 7. It follows that the court did not err in limiting the testimony on the cross-examination to the attempted discrediting of the witness, and in refusing to admit records, except for purposes of impeachment.

It is assigned for error that the court allowed plaintiff Tabor to testify to conversation with McComb after the latter had been called, and had given his version of it. Counsel put it upon the ground that a party can not be allowed to contradict or impeach his own witness. It does not appear that Tabor was called for any such purpose, or that his testimony had that effect. He was called to give his version of what occurred at that interview with McComb. A careful comparison of the testimony of both shows that of Tabor more corroborative of than contradictory to that of McComb—at least, as to the result of such conversation—although there is some discrepancy in regard to the language used. "The party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony:" 1 Greenl. Ev. § 443.

Appellants' counsel rely upon the conversation of Tabor with McComb as a license or consent on the part of Tabor to the entry and taking of the ores from the Maid of Erin

ground, and contend that his license or consent as a co-owner to the extent of one-sixteenth of the Maid of Erin ground was conclusive upon himself, and also upon his co-owners of the other fifteen-sixteenths, and was equivalent to a license or consent from all, to the extent of covering the entire property. A license or consent can not be extended by inference as a consent to enter property not spoken of or referred to in the conversation, and we can find nothing in the testimony of either McComb or Tabor in regard to entering and taking ore from the Maid of Erin ground. It was not attempted to be shown that Ovens, Wight and Rucker entered under license or consent from Tabor. At the conversation both testify that Tabor was informed the parties had entered under an order from the court, against which he was powerless for the time. It further appears that those parties were in at the time McComb and Tabor had the conversation, and McComb only asked consent to join them. It can not be contended that such a consent was a license to Ovens, Wight and Rucker to enter. The testimony went to the jury, and in the eighth and ninth instructions, given on prayer of plaintiffs, they were instructed, in effect, that they could not limit or reduce the amount to be recovered by reason of the supposed license or consent of Tabor, unless they should find that there was a consent on his part that they should enter through the Big Chief shaft, and take the ore from the Maid of Erin claim; and the same proposition is submitted in the instruction given on behalf of defendants in place of No. 7, refused. These instructions on that point, we think, were correct, and fairly submitted to the jury the question of license or consent. And it is evident from the verdict that the jury found against any such license or consent; and, the jury having so found, it would seem unnecessary to determine whether the instructions were correct or otherwise in regard to the extent such consent, if found, should affect or modify the amount; or, in other words, whether it should cover the whole taking of ore, or be confined to the one-sixteenth owned by Tabor. The jury having found no consent or license on the part of Tabor, defendants could not be prejudiced by the instructions of the court in regard to its effect, if it were found.

The question is quite different from what it would be if it related to a transaction in the ordinary course of business relative to the joint property of tenants in common. Here it is attempted to justify a tort, and the injury to the entire property by the supposed license of one joint owner. If the entry had been made by Tabor in person, and the wrongs attempted to be justified under permission from, had been done by, him, his co-tenants could have had against him the same actions at law for injuries to their interests that all are attempting to enforce against parties having no interest. It is held "an action on the case sounding in tort may be maintained by one tenant in common against his co-tenant for a misuse of the common property, though not amounting to a total destruction of it:" *McLellan v. Jenness*, 43 Vt. 183; *Agnew v. Johnson*, 17 Pa. St. 373; *Lowe v. Miller*, 3 Grat. 196. "And, if one tenant in common assume to own and sell the thing held in common, the other may maintain an action of trover against him:" *Burbank v. Crooker*, 7 Gray, 159; *Wheeler v. Wheeler*, 33 Me. 347; *Coursin's Appeal*, 79 Pa. St. 220; *White v. Osborn*, 21 Wend. 72; *Smyth v. Tankersley*, 20 Ala. 212. The authority of the tenant in common could not be extended to cover acts of others that he could not legally have done himself. Hence the court was correct in holding and instructing the jury that the consent or license of Tabor, if such were found, could only extend to the interest owned by him in the common property.

Appellants further assign for error the ruling of the court in admitting the testimony of Tabor when called by the plaintiffs to show that, by a parol agreement made at the time of the conveyance of the different interests by Tabor, Moffatt, and Chaffee in the Henriett Company, possession of the property conveyed was to remain in the grantors until the purchase price was paid; that it never was paid; and possession under the conveyance never delivered. A part of such testimony—that which went to show that possession was to be retained—was inadmissible. "All conveyances of real estate and of any interest therein duly executed and delivered shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for the possession is therein

specified." Gen. St. C. 18, § 9; *Drake v. Root*, 2 Colo. 635. Under the statute, it is certainly required that the intention to postpone the operation of a deed shall be declared in the instrument, and it can not be proved by parol. It follows that the instructions of the court on this point were in part erroneous; that part of the testimony going to prove that possession of the property was never delivered, and remained in the grantors, was clearly competent and proper; and the instructions of the court were proper on that point.

The admission in evidence of the deeds of reconveyance by the Henriett Mining Company and the assignment of Rider of his cause of action was not erroneous, and should be sustained—the former investing plaintiffs with full title before the commencement of suit; and of the validity of the latter, so as to enable Moffat, assignee, to succeed to all the rights of his assignor, there can be no question under our statute. Had defendants, by proper and competent testimony, attempted to prove the ownership of one-half of the Maid of Erin claim in the Henriett Company, it would have been inadmissible. There was no attempted justification of entry of Wight and others under the Henriett title of one-half.

"Under a plea that the close upon which the alleged trespass was committed was not at that time the close of the plaintiff, the defendant may show lawful right to the possession of the close in a third person, under whom he claimed to have acted." *Jones v. Chapman*, 2 Exch. 802. "But a bare tort-feasor can not set up in defense the title of a third person between whom and himself there is no privity of connection." *Branch v. Doane*, 18 Conn. 233. "In justifying under a third person, the defendant must show both the title and the possession of that person" (*Chambers v. Donaldson*, 11 East, 65; *Merrill v. Burbank*, 23 Me. 538; *Reed v. Price*, 30 Mo. 442), and that the acts were done by that person's authority. *Dunlap v. Glidden*, 31 Me. 510. "A defendant can only justify upon the ground of a better right or title than the plaintiffs have. And it has been held that mere naked possession, however acquired, is good as against a person having no right to the possession." *Knapp v. Winchester*, 11 Vt. 351; *Haslem v. Lockwood*, 37 Conn. 500; *Cook v. Patterson*, 35 Ala. 102.

It will be apparent that in the judgment of this court the effort of defendants to set up title to half of the property in the Maid of Erin claim in the Henriett Company, without a plea to that effect, and attempting to show privity or attempting to justify under it, was unwarranted in law, and that no testimony should have been taken in support of any such attempted defense.

Another defense interposed, which seems incompatible with the former, was that certain parties, named in the answer, were the owners of the Vanderbilt claim, and that such claim conflicted with and comprised a part of the Maid of Erin claim, and that the claim was in the possession of the owners named under claim and color of title; and that the ground from which the ore was taken was in conflict between the owners of the claim, and that divers suits in regard to the same were pending and undetermined; that Wight and others, while engaged in mining the Vanderbilt claim, took the ores from the ground in controversy, which defendants bought as Vanderbilt ore; and that the same was taken by the owners of such claim while the *locus* was in their possession under color of title.

It is shown in evidence that there were two entries on the property in controversy—the first by Wight, one of the owners of the Big Chief, in 1882, after the Maid of Erin had a receiver's receipt from the United States Land Office, when a drift was run from the Big Chief shaft for the Maid of Erin, and was run over the line twenty or twenty-eight feet, into the Maid of Erin ground. The second entry was by the same party and others, in the same way, and upon the same ground. Neither entry was made by extending the work of the Vanderbilt claim to its exterior limits, and thus entering the Maid of Erin property. The party entering and participating in the proceeds of the ores mined were not the owners of the Vanderbilt, but seems to have been one made up for the occasion—part of the owners of the Vanderbilt, some of the owners of the Big Chief, and, perhaps, parties owning in neither.

The plaintiffs pleaded title to the Maid of Erin claim from the Government of the United States, and put in evidence

a receiver's receipt for the purchase of the property, of date November 23, 1881, and a patent from the United States Government dated March 17, 1884.

It has been frequently held that a patent for land emanating from the Government of the United States is the highest evidence of title, and in courts of law is evidence of the true performance of every prerequisite to its issuance, and can not be questioned either in courts of law or equity, except upon ground of fraud or mistake, and, if not assailed for fraud or mistake, is conclusive evidence of title. On the 23d of November, 1881, the Government parted with its title to the Maid of Erin property, sold it to Tabor and Du Bois, and gave a receipt. The Government could thereafter no more dispose of the land than if a patent had been issued. "The final certificate obtained on the payment of the money is as binding on the Government as the patent. * * * When the patent issues it relates back to the entry: * * *" *Astrom v. Hammond*, 3 McLean, 107; *Blatchley v. Coles*, 6 Colo. 350; *Poire v. Wells*, Id. 406; *Steel v. Smelting Co.*, 106 U. S. 447; *Heydenfeldt v. Daney M. Co.*, 93 U. S. 634.

The patent does not invest the purchaser with any additional property in the land. It only gives him better legal evidence of the title which he first acquired by the certificate: *Cavender v. Smith*, 5 Clarke (Iowa), 189; Id. 3 G. Greene, 349; *Arnold v. Grimes*, 2 Clarke (Iowa), 1; *Carroll v. Safford*, 3 How. 441; *Bagnell v. Broderick*, 13 Pet. 436; *Carman v. Johnson*, 29 Mo. 84; *Hutchings v. Low*, 15 Wall. 88. A patent title can not be attacked collaterally. "Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them." *Boggs v. Mining Co.*, 14 Cal. 362; *Leese v. Clark*, 18 Cal. 535; *Jackson v. Lawton*, 10 Johns. 24.

An "adverse possession" is defined to be the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under assertion or color of right on the part of the possessor: *Wallace v. Duffield*, 2 Serg. & R. 527; *French v. Pearce*, 8 Conn. 440; *Smith v. Burtis*, 9 Johns. 174.

The entry of a stranger, and the taking of rents or profits

by him, is not an adverse possession. When two parties are in possession, the law adjudges it to be the possession of the party who has the right: *Reading v. Rawsterne*, 2 Ld. Raym. 829; *Barr v. Gratz*, 4 Wheat. 213; *Smith v. Burtis*, 6 Johns. 218; *Stevens v. Hollister*, 18 Vt. 294; *Brimmer v. Long Wharf*, 5 Pick. 131. Possession, to be supported by the law, must be under a claim of right, and adverse possession must be strictly proved: *Grube v. Wells*, 34 Iowa, 150. The color must arise out of some conveyance purporting to convey title to a tract of land: 3 Washb. Real Prop., 155; *Shackleford v. Bailey*, 35 Ill. 391.

The title of the Maid of Erin claim was in the Government of the United States until divested by its own act. There could be no adverse possession against the Government. The claimants of the Vanderbilt claim entered under license only from the Government. Admitting, for the purposes of this case, that the entry under the license was legal, that they had complied with the laws of Congress and the State, and that their possession extended to and was protected to their exterior lines while the fee remained in the Government, when the fee passed from the Government to the other party conveying the *locus*, before that time in controversy, the supposed license was revoked, and all acts and declarations of the parties themselves, whether by record or otherwise, as establishing a possessory right, were void as against the grantees of the Government, and there could be no entry under color of title, except by some right by conveyance either from the Government or its grantees. The fact of the actual possession and occupancy of the Maid of Erin by plaintiffs was not seriously disputed, and the testimony was ample to warrant the jury in finding the fact. The Government had granted the land previous to the entry of Wight and others, and that such possession under a legal title was co-extensive with its bounds is so well settled that authorities in its support are unnecessary.

We do not think the court erred in refusing to admit the testimony offered in support of possessory title of the Vanderbilt in the land from which the ore was taken, nor in refusing the testimony in reference to litigation and suits pending between the parties. Neither the title nor right of possession of plaintiffs could be attacked collaterally as

attempted, and the testimony offered under the law as shown above was incompetent and inadmissible to prove either adverse possession or color of title. From our view of the law controlling the case, as stated above, it follows that the court did not err in refusing the instructions asked on this point by the defendants, or in giving those which were given. They were substantially correct.

The sale of ore by Wight and others, and purchase by the defendants, was a conversion. A "conversion" is defined to be any act of the defendant inconsistent with the plaintiff's right of possession, or subversive of his right of property: *Harris v. Saunders*, 2 Strob. Eq. 370, note; *Webber v. Davis*, 44 Me. 147; *Gilman v. Hill*, 36 N. H. 311; *Clark v. Whitaker*, 19 Conn. 319. The defendants, by purchasing the ore, acquired no title, and are consequently equally liable for its conversion as the parties who sold it: *Clark v. Wells*, 45 Vt. 4; *Clark v. Rideout*, 39 N. H. 238; *Carter v. Kingman*, 103 Mass. 517. And it was a matter of no importance, so far as the legal liability of defendants was concerned, whether they were ignorant or informed of the true ownership: *Morrill v. Moulton*, 40 Vt. 242; *Johnson v. Powers*, Id. 611; *Railroad Co. v. Car Works Co.*, 32 N. J. Law, 517; *Dixon v. Caldwell*, 15 Ohio St. 412; *Hoffman v. Currow*, 22 Wend. 285. The principle *caveat emptor* applies. A person purchasing property of the party in possession, without ascertaining where the true title is, does so at his peril, and, although honestly mistaken, will be liable to the owner for a conversion: *Taylor v. Pope*, 5 Cold. 413; *Gilmore v. Newton*, 9 Allen, 171; *Sprights v. Hawley*, 39 N. Y. 441.

The question of the proper measure of damages is one of much greater difficulty. We can find no conclusive adjudication in our own court. The decisions of the different States are conflicting and irreconcilable. Although, under our code, different forms of action are abolished, the principles controlling the different actions remain the same as before its adoption. Consequently the law applicable and to be administered in each case depends as much as formerly upon the nature of the case—the allegations and the distinctive form the case assumes. In many States the courts have attempted in this action to make the rule of damage

correspond to that in the action of trespass, and make it in that respect as full and complete a remedy. In the State of New York it was long held, and perhaps still is, that the increased value of the property added by the labor and acts of defendant, belongs to the rightful owner of the property, and the value of the property in its new and improved state thus becomes the measure of damages, but the doctrine has been questioned and severely criticised in the same State: *Brown v. Sax*, 7 Cow. 95. In trespass, damage for the whole injury, including diminution in the value of the land by the entry and removal, as well as of the value of the property removed, may be recovered; and the character of the entry, whether willful and malicious, or in good faith, through inadvertence or mistake, is an important element—an element that can not enter into the action of trover. In trover, the specific articles can not be recovered as in replevin. Consequently the same rule as to increased value can not be applied as in that action, where the specific property can be followed, and, when identified, taken without regard to the form it has assumed. It seems, on principle, therefore (and this is in harmony with the English authorities and those of many of the States), that where a party makes his election, and adopts trover, the rule of damage is and should be proper compensation for the property taken and converted, regardless of the manner of entry and taking; and, where the chattel was severed from the realty, regardless of the diminished value of the realty by reason of the taking. In other words, the true rule should be the value of the chattel as such when and where first severed from the realty and becoming a chattel. An examination of the authorities will show that the rule of damages to some extent depends upon the form of action, —whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. This distinction seems well founded in principle and reason. This view of the law is supported by *Martin v. Porter*, 5 Mees. & W. 352; *Wild v. Holt*, 9 Mees. & W. 672; *Morgan v. Powell*, 3 Q. B. 278; *Hilton v. Woods*, L. R. 4 Eq. 432; *Maye v. Yappen*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 481; *Coleman's Appeal*, 62 Pa. St. 252; *Cushing v.*

Longfellow, 26 Me. 306; *Forsyth v. Wells*, 41 Pa. St. 291; *Kier v. Peterson*, Id. 357; *Moody v. Whitney*, 38 Me. 174.

We are therefore of the opinion that the rule of damage adopted, and the instructions of the court as to the measure of damage, were erroneous, and that it should have been the value of the ore sold, as shown, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling from the mine to the defendants' place of business. We do not find it necessary to decide whether or not plaintiffs' counsel, by stating in the complaint that the ore taken and converted was of a certain value "over and above the cost of mining, digging, and extracting the same from the ground, raising the same to the surface, hauling the same to the defendants' reduction works, and the cost of treating the same," and defendants taking issue upon it, precluded them from proving and taking greater damage upon the trial; but if it were necessary, for the purpose of determining this case, we should be inclined to so hold. In this action value is a material averment, and the plaintiffs have deliberately asserted one rule, and, issue having been taken upon it, should not be permitted to change base, and adopt upon trial another, more disadvantageous to the defendants. In this case it could not have been said the evidence was in support of the allegation or directed to an issue. The testimony should have been directed to the issue, or the pleadings amended.

Counsel for appellees, after obtaining leave from this court, assigned for cross-error the refusal of the court to allow interest on the amount found due from the time of the conversion, and the instruction of the court on that point. It is true, as stated by the learned judge, "that interest in this State is a creature of statute, and regulated thereby; that it is only recoverable in the absence of contract in cases enumerated in the statute; and that damages to property arising from a wrong or negligence of the defendants is not one of the enumerated cases." This could not come under the last clause of the instruction. It is not for damage to property. It is for the wrongful detention of money belonging to plaintiffs. It is clearly distinguishable from *Railroad Co. v. Conway*, 8 Colo. 1, 5 Pac. Rep. 142, and

Hawley v. Barker, 5 Colo. 118. There does not appear to have been any decision in this State directly on the question presented. The same statute has been construed in Illinois (from which State it was taken) as allowing interest in this class of cases from the time of the conversion, and there has been an unbroken line of decisions in that State from *Bradley v. Geiselman*, 22 Ill. 494, to *Railroad Co. v. Cobb*, 72 Ill. 148, in which it is said, reviewing the decisions: "The doctrine established by these authorities is, where property has been wrongfully taken or converted into money, and an action of trespass or trover may be maintained, interest may properly be recovered; and this is based upon the statute which authorizes interest when there has been an unreasonable and vexatious delay of payment. There can be no difference between the delay of payment of a money demand and one where property has been wrongfully taken, or taken and converted into money or its equivalent. The two rest upon the same principle." The rule is that when the statute of another State is adopted the construction of the statute in that State is also adopted, and remains in the true construction until authoritatively construed by the courts of the State adopting it. The general rule in trover is that the damages should embrace the value of the property at the time of the conversion, with interest up to the time of judgment, and this rule has been followed in almost if not all the States, and seems right on principle. But our statute does not seem to have received the same construction here as in the State of Illinois. While in that State it has been put plainly and squarely as interest under the statute, in our State damage for the detention of the money equal to the legal interest upon the value of the chattels converted from the time of the conversion has been allowed, not as interest, but as damage: *Machette v. Wanless*, 2 Colo. 170; *Hanauer v. Bartels*, Id. 514; *Tucker v. Parks*, 7 Colo. 62, 1 Pac. 427.

We think the court erred in its instructions to the jury on this point. They should have been instructed to add to the amount found as the value of the ore, as further damage, a sum equal to legal interest on the same from the

time of the conversion. For the errors in assessing the damage, the case should be *reversed, and remanded for a new trial in accordance with the views herein expressed.*

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is reversed. *Reversed.*

1. Contract to reduce ore to pig iron—failure in time and in relative quantities mixed: *Held*, party bound to accept the iron when tendered. *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255. And see *Cunningham v. Judson*, 100 N. Y. 180.

2. An ore contract with a smelter is not assignable. *Arkansas Val. Co. v. Belden M. Co.*, 127 U. S. 379.

3. Moisture in—evidence of amount of. *Lehigh Zinc Co. v. Trotter*, 42 N. J. Eq. 661; 9 Atl. 694.

4. Ore libeled for freight before weighed—held premature. *Henderson v. 300 Tons of Iron Ore*, 88 Fed. 36.

5. Where a smelting company made an offer, fixed price, and the offer was accepted by the general manager: *Held*, a contract of sale. *Robert E. Lee Co. v. Omaha Co.*, 26 Pac. 326.

SLATER V. HAAS.

(15 Colorado, 574. In the Supreme Court, 1890.)

¹ Co-tenant suing for his proportion of salary retained. Plaintiff and his co-tenants worked a mine together, employing a common superintendent. Plaintiff gave notice to his co-owners and to the superintendent (which notice was acquiesced in) that he would not be responsible from that time for any share of the debts of the mine or of the superintendent's pay. The superintendent continued to work and withheld out of the income his entire salary: *Held*, that the partnership had been dissolved, and that plaintiff could recover his proportion of the salary so retained, and this without making his co-owners parties to the action.

Appeal from Lake County Court.

This was an action originally brought by Haas as plaintiff, against Slater, in a justice's court, to recover a small money judgment. On appeal in the county court plaintiff recovered judgment for \$112. The defendant Slater appeals to this court.

Mr. S. J. HANNA, for appellant.

PER CURIAM.

The assignments of error are confined to the overruling of defendant's motion for nonsuit and to the rendering of final judgment in favor of plaintiff. The trial in the County Court was without a jury, and the only objections or exceptions appearing in the record are as follows: At the close of plaintiff's evidence "the defendant's counsel moved the court for a nonsuit, on the ground that plaintiff had failed to prove a good cause of action, which motion the court overruled." The defendant excepted to the ruling, and also excepted to the finding and decision of the court against him at the close of the trial, but did not state the grounds of his objection.

¹ *Thompson v. Newton*, 7 Atl. 64.

There being no written pleading (*Thorne v. Ornauer*, 8 Colo. 353), the questions to be determined on this appeal must be gathered from the evidence. The evidence shows that plaintiff and several other persons, some of them non-residents, were tenants in common of a certain mine in Lake County, plaintiff's interest being one-eighth. These co-tenants employed Slater to work the mine, extract and sell the ores, and account to the owners for the proceeds. By this arrangement it is assumed by counsel for appellant that plaintiff and his co-owners entered into a copartnership, thus constituting a relationship different from that existing between them as tenants in common; and, hence, that plaintiff can not maintain this action in his own name for his share of the proceeds of the mine in the hands of the defendant arising out of such employment. There is no evidence of an express contract of copartnership having been agreed to between the several owners for any fixed or definite period or at all. Nevertheless, the existence of a mining partnership, with its peculiar limitations and conditions, may perhaps be inferred from the acts of the parties and the circumstances appearing in evidence: *Manville v. Parks*, 7 Colo. 128; *Charles v. Eshleman*, 5 Colo. 111.

During the progress of the work a controversy arose between the plaintiff, Haas, and the defendant, Slater, as to the rate of wages per month the latter was to receive under his contract of hiring; and finally plaintiff undertook by written notice to defendant to terminate defendant's employment so far as plaintiff's interest in the mine was concerned. In such notice plaintiff declared that after a certain date, so far as his (plaintiff's) interest was concerned, he would dispense with defendant's services, and would in no way be responsible for any debts that might be contracted in connection with said mine without his personal consent. This notice was received by defendant, and the substance thereof was promptly communicated by him in writing to the other owners. In such communication defendant, Slater, declared that so long as the other owners chose to retain him in their employ it would not increase their expenses at all, but would only decrease his salary twelve and one-half per cent.—that is, one-eighth—and

that he was ready to relieve plaintiff, Haas, of the burden of his salary. It does not appear that the other owners made any objection to this new arrangement. In addition to giving defendant notice of his withdrawal from the enterprise of working the mine, plaintiff also posted a written notice at the shaft-house, giving similar notice to all persons employed by or dealing with Slater in working the mine.

The acceptance of plaintiff's notice by defendant, and his express assent to its terms, the communication thereof to the other owners, and their acquiescence therein, together with his posted notice to all other persons interested, justify the conclusion that there was a withdrawal by plaintiff from any mining copartnership which may have theretofore existed between the several co-tenants. The other owners, as well as plaintiff and defendant, having notice of the new arrangement, the court was warranted in finding that there was a complete termination by mutual consent of plaintiff's liability to defendant under the original contract of employment, and that by this means plaintiff's interest in the proceeds of the mining property was entirely severed from that of his co-tenants.

The defendant continued working the mine and extracting ores therefrom for several months after the withdrawal of plaintiff as aforesaid. The evidence was somewhat conflicting as to the rate of monthly wages the defendant was entitled to receive; but it is clear that defendant at the close of his employment reserved out of the proceeds of the mine his monthly wages at the full rate and for the full time as originally claimed by himself, disregarding altogether the abrogation of the original contract resulting from plaintiff's written notice, his own response and the acquiescence of the other owners.

Though not specifically so stated, it is obvious that the finding and judgment of the court were based upon the amount of plaintiff's interest in the surplus proceeds of the mine in the hands of defendant, according to the theory that plaintiff's liability under the original contract had been terminated and his interest in the proceeds of the mine severed from that of his co-tenants.

The findings of fact by the trial court upon the conflict-

ing evidence can not properly be disturbed. Plaintiff's share in the proceeds of the mine having been entirely severed from that of his co-tenants, there appears to be no legal obstacle to his recovery of the same in this action. The judgment of the County Court is accordingly affirmed.

Affirmed.

1. Judgment can not be taken against members of a firm not served. *Davidson v. Knox*, 67 Cal. 148.

2. Relation of the members to each other—fraud between, on mining option. *Caldwell v. Davis*, 10 Colo. 481.

3. Partnership to buy and sell land must be in writing. *Young v. Wheeler*, 34 Fed. 98. A partner may sell the entirety in a parcel of land. *Id.*

4. Ownership of mine in name of one partner. Liability for miners' liens. *Rosina v. Trowbridge*, 17 Pac. 751.

5. Partner lent his partner all the share of the borrower and took security. *Held*, entitled to foreclosure before accounting. *Bull v. Coe*, 18 Pac. 808.

6. Where partner aids defendant he is estopped to claim division of the judgment recovered. *Miller v. Chambers*, 34 N. W. 830; 5 Amer. St. Rep. 675.

7. Sale between, after concealment, for low price, set aside. *Bozman v. Patrick*, 36 Fed. 138.

8. Sufficient evidence of acts to prove a quarry co-partnership. Organization of partnership into corporation not notice to third parties. *First Nat. Bank v. Conway*, 30 N. W. 215.

9. Must account for profits, where one partner is the active agent and contracts for his own benefit. *Kimberly v. Arms*, 129 U. S. 512.

10. Quarry not firm assets. Lien of partner. *U. P. Ry. v. Kennedy*, 20 Pac. 696.

11. Construction of articles. Skill against capital. The skilled partner liable to contribution on the losses. *Hellebush v. Coughlin*, 37 Fed. 294.

12. Loans between the members are not partnership items and may be sued for without a settlement. *Bull v. Coe*, 77 Cal. 54.

13. Defendants were mine owners in unequal parts and agreed to work the mine in proportion to their interests. *Held*, that a mining partnership was proved. *Randall v. Meredith*, 11 S. W. 170.

14. A mining partner may not borrow money on the credit of the firm, but such borrowing will hold the firm if ratification be proved. *Id.*

15. A mining partnership may be proved by parol testimony, but the evidence in such case should be clear. *Mayhew v. Burke*, 29 Pac. 106.

16. The majority interest controls and the minority owner may be enjoined from working except as directed by plaintiff. *Hawkins v. Spokane M. Co.*, 28 Pac. 483.

THE UNITED STATES V. THE MARSHALL SILVER
MINING Co. ET AL.

(129 U. S. 579. Supreme Court, 1889.)

When the United States retires from the prosecution of a suit instituted to vacate a patent of public land, without causing the appeal to be dismissed, and another party, claiming the same land under another patent, is in court to prosecute the appeal, this court will not dismiss it on the motion of the appellee as of right, but will look into the case, and if the circumstances require it, will hear argument on the case and decide it.

Errors in land office. Errors and irregularities in the process of entering and procuring title should be corrected in the land department, so long as there are means of revising the proceedings and correcting the errors.

Silence for more than eight years after a party has abandoned a contract for patent of mineral land, and has submitted to a decision of the question by the land department, however erroneous, is such laches as amounts to acquiescence in the proceedings and precludes a court of equity from interfering to annul them.

Patent set aside only for gross irregularity. When the officers of the land department act within the general scope of their powers in issuing a patent for public lands, and without fraud, the patent is a valid instrument, and the court will not interfere, unless there is gross mistake or violation of law.

Scope of Bill to Vacate Patent. A bill in chancery brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere retrial of the case before the land office.

Presumption of Regularity. The holder of a patent from the United States can not be called upon to prove that everything has been done that is usual in the proceedings in the land office before its issue; nor can it be called upon to explain every irregularity, or even impropriety, in the process by which the patent was procured.

Appeal from the Circuit Court of the United States for the District of Colorado.

JOHN H. HICKCOX, JR., and J. K. REDDINGTON, for appellant.

R. S. MORRISON and SIMON STEEN, for appellees.

MILLER, J.

The case before us originated in a bill in equity brought in the Circuit Court of the United States for the District of Colorado, in the name of the United States of America, by its attorney general, and the district attorney of the United States for that district, against the Marshall Silver Mining Company and the Colorado Central Consolidated Mining Company, defendants. The purpose of the bill was to set aside and vacate a patent issued by the Government to the Marshall Silver Mining Company, for a vein or lode of mineral deposit, lying in the Griffith mining district, in the County of Clear Creek, Colo., known as the "Tunnel Lode No. 5," dated on the 8th day of June, 1874. Afterward another patent, including a part of the same land covered by the one just referred to, was issued to McClellan, Rist and Webster, upon what was called the "Cayuga Lode," on the 31st day of January, 1882.

The grounds which are set up in the bill for vacating the first-mentioned patent are mainly such as go to show that its issue fraudulently deprived the holders of the second instrument of the right to the title of so much of the land as is covered by the conflicting boundaries described therein, so that the result of a decree annulling the first patent would be to give to the claimants under the second, the paramount title. The Circuit Court, after hearing the case on the bill, two different demurrers, answers, replication, and a large amount of testimony, dismissed the suit. From that decree the present appeal was taken by the United States.

At the beginning of this term the attorney for the Government filed in this court a statement that the United States had no pecuniary interest in the suit, and the officers charged with the conduct of such matters on the part of the Government declined to take any farther part in the argument of the case. They did not, however, dismiss the appeal, and made no objection to its prosecution by the private parties interested in the matter, who had conducted the case from its inception. Thereupon a motion was made by the appellees and argued before the court, to dismiss the appeal, which was resisted by the counsel interested in the

second patent. Under all the circumstances, the court determined to hear it, refused the motion, and, after thorough argument, the case is now before us for decision.

The charges which are made the basis for the relief sought here may be comprehended under two heads, although they are so mingled together in the bill that it seems doubtful whether they were intended to be considered and treated as separate propositions. The main ground is an allegation of fraud, practiced upon the parties claiming the Cayuga lode, by collusion between those having the management of the claim to Tunnel lode No. 5, and certain officers of the land department, and particularly the register and receiver of the land office located at Central City.

The material facts are that the claimants to both of these lodes seem to have been prospecting in that vicinity, and discovered mineral in their different claims about the same time. They each had their claims staked out and surveyed by deputy surveyors of the United States, and about the same time they each made application to the land office for their entry, with a view of obtaining patents therefor. Upon the application being made for a patent upon the Cayuga lode, the Marshall Silver Mining Company, discovering that it interfered with a portion of their claim, brought a suit in the local court of the State, under the act of Congress on that subject (Sec. 2326, Rev. St.), against McClellan, Rist and Webster, asserting the superiority of their claim to a patent for the land in controversy. The statute provides that the judgment in such a suit shall govern the rights of the parties in the land office. This suit was on the docket of the court for some time, perhaps a year or more. In the meantime Rist, one of the parties in interest under the claim to the Cayuga lode, made a disclaimer in the local land office of the proceedings taken by his partners, in the name of McClellan, Rist and Webster, and so far as he was interested in that claim directed the proceedings to be dismissed. Accordingly the register and receiver of that office made an entry dismissing the claim to the Cayuga lode, and the application for a patent thereon, under the belief, as they expressed it, that such was the necessary result of the action of Rist.

One of the questions of fact which is disputed in this

case is whether McClellan and Webster had notice of these proceedings, which resulted in the dismissal of the application for a patent upon the Cayuga claim. This will be considered presently.

Not long after this order was made in the local land office the owners of the Tunnel lode, who had assumed the name, either by incorporation or as partners, of the Marshall Silver Mining Company, dismissed the suit which they had brought in the State court, contesting the right of the Cayuga claimants to a patent for the property in controversy. They obtained from the clerk of the court a certificate of such dismissal, and thereupon proceeded in the prosecution of their claim in the land office *ex parte*. They procured from the surveyor of the United States, by his deputy, an amended survey of their claim, and it was then allowed by the local officials. It was forwarded by them to the commissioner of the general land office, who, after a full consideration of the subject, occupying nearly a year, issued to the Marshall Silver Mining Company the patent which is now assailed by the bill of complaint in this case. They had before taken possession of the property, and they worked the lode now in dispute for about eight years and a half, without any complaint being made by the claimants of the Cayuga lode. At the end of that time these parties appeared before the land department, denied the validity of the order dismissing their claim, and, proceeding themselves *ex parte*, without notice to the Marshall Silver Mining Company, procured the patent already referred to, dated January 31, 1882. The main controversy arising out of this condition of affairs is upon the allegation that Rist was corruptly induced to apply to the register and receiver of the local land office for the dismissal of the claim in which he was an interested party, and that these officers were in collusion with him and the claimants of the Tunnel lode in making the order which they did.

It must be conceded that there is a total failure to establish any such corrupt motive or action on the part of either the officers or Rist. What the motives were which induced Rist to make his application to the officers of the land office,

is not very plain, but he acted through Mr. Butler, a lawyer of character and reputation, and no evidence is introduced showing that he was imposed upon, misled, or bought up. Still less is there any evidence that the register or receiver were bribed or influenced by any improper motives in the action which they took.

It is alleged in the answer that the legal view which these officers took of the matter, that a withdrawal on the part of one of the claimants who had a real interest in the claim required the dismissal of the whole claim, may have been the law of the case. We do not consider it necessary now to inquire whether such was the law.

It is also alleged in the answer that such had been the course of proceeding in similar cases before that time in the land department. We do not know that there is any evidence that such had been the ruling, or that a contrary decision had ever been made. At all events, as the case presents itself to us, there is no corrupt or fraudulent motive on the part of these officers shown as a foundation for setting aside this patent. Whether or not there was a mistake made by them in regard to the law of the subject we do not think it necessary to decide now; nor are we satisfied that, if it was a clear mistake of law by these officers, it was so far an essential element in the final determination of the commissioner of the general land office of the rights of the parties as to invalidate the patent issued as the result of those proceedings.

This point, in our opinion, is relieved of any difficulty by the subsequent conduct of McClellan, Rist and Webster, in regard to the matter, which amounted to an acceptance of the decision of the register and receiver, and an acquiescence in it, that forbids an assertion by them now of a claim which they might have asserted at a previous stage of the transaction. McClellan, and perhaps another of the claimants, lived at Georgetown, Colo., about twenty miles from the land office at Central City, where all these proceedings were conducted, and some twenty-two miles from the locality where the lodes in question were situated. Although there is some dispute as to whether they received notice of the order dismissing their claim, we are of opinion

that the evidence clearly preponderates in favor of the conclusion that they did receive such notice immediately after the order was made.

It appears from the testimony of Arnold, the receiver of the land office at Central City, which is supported by a press copy of a letter, that he notified McClellan and Webster, on April 30, 1873, of the dismissal of the Cayuga claim; and that this notice was given by mail, in conformity with the usual practice of the office at that time. Arnold also testifies that he knows that McClellan received the letter.

The suit in the State court was dismissed by the Marshall Silver Mining Company shortly after the order was made by the local land office dismissing the Cayuga claim. That was a suit in which McClellan and Webster were defendants. It had been progressing for some time, and it is impossible to believe they did not have notice of its dismissal; for ordinary attention to their own interests would have required them to know what was going on in regard to it.

The Marshall Silver Mining Company and the Colorado Central Consolidated Mining Company, to which the former conveyed their interest, continued working the mine upon their lode from 1873 until 1882, without any interference on the part of McClellan or Webster, and the former admits that he knew those companies were so working; yet, during all this time, a period of some eight years and a half, they made no objection to such working, although they must have known all that was going on in regard to it. They acquiesced in the proceedings, and made no effort to set aside the patent, or to correct any injustice which had been done them in the proceedings upon which the patent had been issued, while the other parties had full and undisputed possession of the land.

It may be said that they could not help themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the right to appeal to the commissioner of the general land office from the order of the register and receiver dismissing their application. This was not done, and it never has been done. When parties are engaged in a contest, both before the courts and in the land office, with regard to their rights in a deposit of mineral or a

lode, in both of which tribunals action has been taken, putting one party entirely out of court in the pending suit, and dismissing the same party's application for a patent, and there is a right of appeal, it would be a most inequitable rule to hold that, after he has acquiesced and remained silent for more than eight years, while the successful party is in possession of the lode in controversy, working out its mineral, right in the face of the unsuccessful party, the latter can resume the contest after this long interval, and after the legal title has passed from the United States. Under the decisions made by this court there is no doubt that the legal title to this mineral land did pass from the United States by the first patent: *U. S. v. Schurz*, 102 U. S. 378.

All the errors and irregularities which occur in the process of entering and procuring title to the public lands of the United States ought to be corrected within the land department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party can not be permitted to remain silent for more than eight years after he has abandoned a contest, and submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity, after the title has passed from the United States, and seek to correct the errors which may have occurred during the progress of the proceedings in the land office. If the officers of that department of the Government have acted within the general scope of their power, and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere, unless there is such a gross mistake or violation of the law which confers their authority as to demand a cancellation of the instrument.

We see no such gross mistake in the present case, but do think there is such *laches* as amounts to acquiescence in regard to the proceedings before the land department, as to which error is charged, and precludes the interference of a court of equity to annul or set aside the patent issued in 1874.

We have recently had before us a number of this class of cases, in which the attempt has been made to invalidate by a decree of the court, patents which have been issued by the Government of the United States to private parties. There

has been such frequent occasion to consider the subject that it would be only a repetition to go over the ground again. This whole question was very fully reviewed during the present term of the court in the case of *U. S. v. Iron Silver M. Co.*, 128 U. S. 673, in the opinion delivered by Mr. Justice Field, in which the various decisions were re-examined with care. The more important of these cases are *Maxwell Land-Grant case*, 121 U. S. 325, and *Colo. Coal & Iron Co. v. U. S.*, 123 U. S. 307. To these may be added *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, and *U. S. v. Beebe*, 127 U. S. 338.

Some point is made, in the bill and in the argument, concerning the amended survey of the Tunnel lode claim, and the manner of its presentation to the commissioner of the general land office, with other irregularities which are suggested and pointed out; but we think it must be taken to be the settled doctrine of this court that a bill in chancery, brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere retrial of the case as it was before the land office, with such additional proof as the parties may be able to produce.

The dignity and character of a patent from the United States is such that the holder of it can not be called upon to prove that everything has been done that is usual in the proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity, or even impropriety, in the process by which the patent is procured. Especially is it true that where the United States has not received any damage or injury, and can obtain no advantage from the suit instituted by it, the conduct of the parties themselves, for whose benefit such action may be brought, must itself be so free from fault or neglect as to authorize them to come with clean hands to ask the use of the name of the Government to redress any wrong which may have been done to them.

One matter which has been much discussed before us is, whether the Colorado Central Consolidated Mining Company, one of the defendants in this suit, and the present owner of such title as passed to the Marshall Silver Mining

Company by the patent sought to be vacated, is an innocent purchaser of the property in ignorance of any of the matters set up by the complainants. While it is not necessary to pass upon this subject in the view we have taken of the case, it is not improper to say that, as presented to us, the claim of that company to be an innocent purchaser presents a very formidable objection to the granting of the relief asked for in a court of equity.

The decree of the Circuit Court for the District of Colorado is affirmed.

1. Ownership where end lines adjoin. *Champion Co. v. Cons. Wyoming Co.*, 16 M. R.
2. Will not be set aside because on mineral land after seventeen years laches. *U. S. v. Wenz*, 84 Fed. 154.
3. Authority of attorney-general to proceed to set aside. *Mullan v. U. S.*, 118 U. S. 271.
4. Validity of, when issued pending adverse claim. *Deno v. Griffin*, 20 Pac. 308.
5. Patent is conclusive of all preliminary prerequisites and can not be collaterally attacked. *Gale v. Best*, 78 Cal. 285; 20 Pac. 550.
6. A patent for land, as agricultural, is a conclusive declaration in a court of law that the land is non-mineral. *Id.*
7. A mining claim is capable of alienation before patent. When so conveyed the subsequent issue of patent inures to the grantee. The interest of such grantee is not an adverse claim requiring for its protection an opposition to the patent. *Suessenbach v. First Nat. Bank*, 41 N. W. 662.
8. The certificate of the surveyor-general that \$500 has been expended is conclusive evidence of the fact. *U. S. v. King*, 22 Pac. 498.
9. Locators in possession are in privity with the United States and can contest a State patent. *Hermocilla v. Hubbell*, 26 Pac. 611.
10. A patent issued without authority of law is void. And where a patent is void, its holder can not be declared a trustee. *Rose v. Richmond Co.*, 27 Pac. 1105.
11. The patent lines are controlled by the monuments set. *Bell v. Skillicorn*, 28 Pac. 768.
12. Entries and patents of coal lands by officers, stockholders and employes of a private corporation who conveyed to the company: Held invalid and to be set aside without requiring offer to refund purchase money. *U. S. v. Trinidad Coal Co.*, 137 U. S. 160.
13. In a contest between a townsite patent and a lode patent of later date the townsite patent should be allowed to prove that the land was not a known mining claim at the date of the townsite entry, to rebut the presumption to the contrary from the fact of the issue of the lode patent later. *Davis v. Weibbold*, 189 U. S. 507.
14. The patent is exempt from collateral attack at law only where the land department had jurisdiction to issue it and power to determine the facts necessary to such issue. *Id.*

DAHL V. RAUNHEIM.

(132 United States, 260; 10 S. C. Rep. 74. Supreme Court, 1889.)

¹ **Government a Trustee for the Locator.** One who has made application for patent on his claim in the land office and has complied with all preliminary requirements without meeting any adverse claim, is the equitable owner of the land and the Government holds the title in trust for him.

Where the Question of "Known Lode" is left to the jury under proper instructions, their finding is conclusive of the fact.

The discovery of a lode 200 or 300 feet outside the placer boundaries creates no presumption of the existence of any lode within such placer claim.

² **When a person applies for a placer patent in the manner prescribed by law, and all the proceedings in regard to publication and otherwise are had thereunder which are required by the statutes of the United States, and no adverse claims are filed or set up, and it appears that the ground has been surveyed and returned by the surveyor-general to the local land office as mineral land, the question whether it is placer ground is conclusively established and is not open to litigation by private parties seeking to avoid the effect of the proceedings.**

The rulings upon a motion for a new trial are not open to consideration in this court.

In error to the Supreme Court of the Territory of Montana.

W. H. DE WITT, for plaintiff in error.

FIELD, J.

This is an action to quiet the title of the plaintiff below to certain placer mining ground, forty acres in extent, situated in Silver Bow County, Mont., of which he claims to be the owner, and in a portion of which the defendant claims to have some right and interest, and for which portion he has applied for a patent. The plaintiff asserts title under a location of the ground as a placer claim on the 22d of February, 1880, by parties from whom he purchased.

¹ *Noyes v. Mantle*, 127 U. S. 348.

² Syllabus of the official reporter; see note, p. 217.

The defendant asserts title to a portion of that ground, being three acres and a fraction of an acre in extent, as a lode claim under a location by the name of the "Betsy Dahl Lode," made subsequently to the location of the premises as placer mining ground, and subsequently to the application by the plaintiff for a patent therefor. That application was made on the 16th of July, 1881, and the register of the local land office caused notice of it to be published as required for the period of sixty days. All the other provisions of the law on the subject were also complied with. See *Smelting Co. v. Kemp*, 104 U. S. 636, 653. To this application, no adverse claim to any portion of the ground was filed by the defendant or any other person, and the statute provides that in such case it shall be assumed that the applicant is entitled to a patent upon certain prescribed payments, and that no adverse claim exists. The statute also declares that thereafter no objection of third parties to the issue of a patent shall be heard except it be shown that the applicant has failed to comply with the requirements of the law. No such failure was shown by the defendant. He is therefore precluded from calling in question the location of the claim, or its character as placer ground.

The only position on which the defendant can resist the pretensions of the plaintiff is that the placer ground, for a patent of which he applied, does not embrace the lode claim. The effect to be given to that position depends upon the answer to the question whether, at the time of his application, any vein or lode was known to exist within the boundaries of the placer claim which was not included in his application. Section 2333 of the Revised Statutes provides that, when one applies for a placer patent who is at the time in the possession of a vein or lode included within its boundaries, he must state that fact; and then, on payment of the sum required for a vein or lode and twenty-five feet on each side of it, at \$5 an acre, and \$2.50 an acre for the placer claim, a patent will issue to him covering both the placer claim and the lode. But it also provides that, where a vein or lode is known to exist at the time within the boundaries of a placer claim, the application for a pat-

ent which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode; and also that, where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

It does not appear in the present case that a patent of the United States has been issued to the plaintiff; but it appears that he has complied with all the proceedings essential for the issue of such a patent. He is therefore the equitable owner of the mining ground, and the Government holds the premises in trust for him, to be delivered upon the payments specified. We accordingly treat him, in so far as the questions involved in this case are concerned, as though the patent had been delivered to him. Being entitled to it, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title.

When it can be said that a lode or vein is known to exist in a placer mining claim, within the meaning of Section 2333 of the Revised Statutes, was considered to some extent in *Reynolds v. Iron Silver M. Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601, and *Iron Silver M. Co. v. Reynolds*, 124 U. S. 374, 8 Sup. Ct. Rep. 598, and also in *Noyes v. Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. Rep. 1132; and some of the difficulties in giving an answer that would be applicable to all cases were there stated. In the present case no difficulty arises, for the question was left to the jury, and decided by them. The court instructed them to the effect that if they believed that the premises were located by the grantors and predecessors in interest of the plaintiff as a placer mining claim in accordance with law, and they continued to hold the premises until conveyed to the plaintiff, and the plaintiff continued to hold them up to the time of his application for a patent therefor, and at the time of such application there was no known lode or vein within the boundaries of the premises claimed, their verdict should be for the plaintiff.

The jury, having found a general verdict for the plaintiff, must be deemed to have found that no such lode as claimed by the defendant existed when the application of

the plaintiff for a patent was filed. We may also add to what is thus concluded by the verdict that there was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application, or at any time before. The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

¹It is earnestly objected to the title of the plaintiff that he did not present any proof that the mining ground claimed by him was placer ground. It appeared that the ground had been surveyed and returned by the surveyor-general of Montana to the local land office as mineral land; and the defendant, in asserting the possession of a lode upon it, admits its mineral character. That it was placer ground is conclusively established, in this controversy, against the defendant, by the fact that no adverse claim was asserted by him to the plaintiff's application for a patent of the premises as such ground. That question is not now open to litigation by private parties seeking to avoid the effect of the plaintiff's proceedings.

Several questions presented by the plaintiff in error in his brief we do not notice, because they arise only upon the motion made by him for a new trial. The rulings upon such a motion are not open to consideration in this court.

Judgment affirmed.

¹This paragraph taken by itself would seem to hold that a lode claim must in every instance adverse a placer application notwithstanding the express reservation of all known lode claims from the grant of the patent. But in connection with the preceding paragraphs it can not have been so intended. From the report of the case below, *Raunheim v. Dahl*, 6 Mont. 167, it appears that the placer was located in 1880; the Betsy Dahl lode in March, 1881, and the placer patent application was made in July, 1881. The Betsy Dahl discovery shaft was several hundred feet from the placer, though evidently the surface lines of the lode conflicted with the surface of the placer. But within the conflicting area there were no surface indications or other evidence of the existence of a lode.

IRON SILVER MINING CO. v. CAMPBELL.

(135 United States, 286; 10 S. C. Rep. 765. Supreme Court, 1890.)

¹ A lode patent, issued subsequent to the issue of a placer patent of a tract within whose metes and bounds the lode patent is located, is not conclusive evidence that the lode was such a known lode at the time of the issue of the placer patent as to authorize the issue of a later patent for the lode itself.

² Where two parties have patents for the same tract of land, and the question in a judicial proceeding is as to the superiority of title under those patents, and the decision depends upon extrinsic facts not shown by the patents, it is competent to establish it by proof of those facts.

Land office can not pass on Known Lode. The action of the land office in issuing a lode patent over the ground of an already patented placer does not bind the placer patentee to concede such lode to have been one of those excepted by the general terms of his placer patent.

The word "Claim" as used in the mining acts, is used to refer to a title not yet perfected by patent.

Original patent not bound to adverse. Where the land office issues a second patent over ground already patented to another, as in case of a lode carved out of a placer, the holder of the prior patent is not bound to protest or adverse, and the question of the validity of the second patent depends upon the question of fact whether or not the lode was a known lode and as such excepted from the prior patent.

Error to the Circuit Court of the United States for the District of Colorado.

F. W. OWERS, ASHLEY POND, L. S. DIXON, and E. O. WOLCOTT, for plaintiff in error.

T. M. PATTERSON and C. S. THOMAS, for defendants in error.

MILLER, J.

This is a writ of error to the Circuit Court of the United States for the District of Colorado. The action was brought in that court by Peter Campbell et al., plaintiffs, against the Iron Silver Mining Company, defendant, and was in the nature of an ejectment to recover possession of a mineral lode called the "Sierra Nevada Lode Mining Claim." The pleadings merely set up that the plaintiffs

¹ *McFeters v. Pierson*, 24 Pac. 1076.

² *Iron S. M. Co. v. Mike Co.* 148 U. S. 304; *Same v. Sullivan*, Id. 481.

were the owners of said lode or claim, describing it, and that defendants had intruded upon their possession. The defendants denied that plaintiffs were the owners of the claim, and asserted their own title. The case was submitted to the court without a jury. The court made the following finding of facts and conclusions of law, on which it rendered a judgment for the plaintiffs.

"This cause coming on for trial before the court, and the parties appearing by their attorneys, and having, in open court and by their stipulation in writing filed with the clerk, waived a trial by jury, and the court, having duly heard and considered the evidence, oral and documentary, offered by the respective parties, and having duly deliberated thereon, finds the following facts and conclusions of law, viz.:

"That the defendant, the Iron Silver Mining Company, is a corporation created and organized and existing under and by virtue of the laws of the State of New York, and has complied with the laws of the State of Colorado so as to entitle it to do business and sue and be sued, in the State of Colorado.

"That the mining ground and property described in the pleadings in this action were a part of the public domain of the United States until the title thereof passed out of the United States by the issuing of patents as hereinafter set forth.

"That the said patent of the Sierra Nevada lode mining claim was issued to the said plaintiffs and their grantors and predecessors in interest at the time thereto stated, and, by duly executed and recorded deeds of conveyance, the title to the land mentioned and described in the said patent and the complaint in this action has been conveyed to, and is seized, owned, and possessed by, the said plaintiffs, and was so seized, owned, and possessed by them at the time of the commencement of this action.

"That on the 13th day of November, 1878, said William Moyer duly made application in the proper United States land office to be allowed to enter and pay for a patent for said William Moyer placer mining claim, being survey lot No. 300 and mineral entry No.—; that on the 21st day of February, 1879, said William Moyer was allowed to and did

make entry in said land office of the United States, and paid for the said placer claim, and that on the 30th day of January, 1880, the said William Moyer placer patent was issued to the said William Moyer for the tract of land described in said placer patent, and that, by virtue of duly executed and recorded deeds of conveyance, the said defendant company has become the owner of, and seized of, all the right, title, and interest in and to the said tract of land described in and conveyed by the said placer patent.

“That the ground described in said patent of plaintiffs for the said Sierra Nevada lode claim is principally located or situated within the exterior boundaries of the tract of land described in said placer patent for the said William Moyer placer claim, and is a part of the same land, and the maps introduced in evidence, and contained in the bill of exceptions and record, correctly delineate the surface of the ground comprised within the exterior boundary lines of the said placer patent and the said lode patent, respectively.

“And the court finds, as conclusions of law from the foregoing findings of fact, that it is conclusively presumed and found, from the face of said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located, and recorded, and owned by the said patentees in said Sierra Nevada lode patent, and their predecessors in interest (the said plaintiffs), within the exterior boundaries of the said tract of land described in said William Moyer placer patent, before the time of the said application for the said placer patent, and the mining ground described in the said complaint and conveyed by the said lode patent is excepted out of the grant of the land described in and conveyed by the said placer patent.

“And the court finds that the plaintiffs were at the time of the commencement of this action, and still are, the owners and seized of said tract of land described in said complaint, and called the ‘Sierra Nevada Lode Mining Claim;’ that the said defendant company wrongfully withheld, and still does wrongfully withhold, the possession thereof from the said plaintiffs.

“It is therefore ordered and adjudged that the plaintiffs have judgment against said defendant company for posses-

sion of the mining ground in dispute, as described in the complaint herein, with costs to be taxed.

"And, forasmuch as the matters and things above herein set forth do not appear of record, and the said defendant tenders this its bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, and pursuant to the statutes in such case made and provided, which is accordingly done this eighth day of July, 1885, being one of the judicial days of the May term of the said court, A. D. 1885, at the city of Denver, in said district. [Signed] Moses Hallett, Dis't Judge."

This finding of facts and conclusions of law is embodied in, and made a part of, a bill of exceptions. We think the correct practice in cases submitted to a court without a jury, is for the court to make its finding of facts and its conclusions of law a separate paper from pleadings or bills of exceptions.

The only thing of any consequence in the bill of exceptions containing a considerable amount of oral testimony, almost every word of which is objected to by one party or the other, is the two patents under which the adverse parties claim title. From this and the finding of facts it appears that the patent under which the Iron Silver Mining Company claims was issued to William Moyer on his application, made in the proper land office, on the 13th of November, 1878, and bears date January 30, 1880, and that the one under which plaintiffs below claim bears date March 15, 1883. It is conceded that both patents cover the land in controversy. The Moyer patent, being the elder, is for fifty-six acres of placer mining land. The plaintiffs' patent, though of a later date, is for a vein or lode of mineral deposit which runs under the surface of the ground covered by defendant's patent.

The conclusion of law which controlled the judgment of the Circuit Court in the present case is that "it is conclusively presumed and found, from the face of the said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located, and recorded, and owned by the said patentees in the said Sierra Nevada lode patent, and their predecessors in interest, the said plaintiffs, within the exterior boundaries of said tract of

land described in said William Moyer placer patent, before the time of the said application for the said placer patent; and the mining ground described in the said complaint, and conveyed by the said lode patent, is excepted out of the grant of the land described in and conveyed by the said placer patent." It is the soundness of this conclusion of the law from the facts found which we are called upon to review.

The real principle on which the plaintiffs relied to establish the superiority of their claim for the lode in controversy is that it was a known lode, within the meaning of the act of Congress on that subject¹ at the time of the application for the Moyer patent, and therefore, by the act of Congress on that subject, the title to it did not pass to the grantee in that patent. If the fact were proved that the Sierra Nevada lode was a known lode, within the limits of the placer patent obtained by Moyer, at the time of his application, the contention of the plaintiffs is sound. But notwithstanding, nearly all the testimony, particularly all the oral testimony found in the bill of exceptions, was introduced for the purpose of proving the existence of this lode, and that it was known to Moyer or his grantor; and in refutation of that proposition the court in its finding of facts makes no finding on that subject. It was obviously the opinion of the court, and it is the ground on which defendants in error support its judgment here, that the patent issued by the Government is conclusive evidence that such vein was known so as to authorize the land department to issue a patent for it as being reserved out of the grant in Moyer's patent. It is very singular that the patent to Campbell and others for the Sierra Nevada claim makes no reference to this reservation in Moyer's patent, and no statement that the existence of the lode was known to anybody at the time the Moyer patent was applied for, or when it was granted.

There is nothing on the face of this patent to show that there was any contest before the land department on this question of the existence of the vein, and the knowledge of it, on which the validity of the patent is now supposed to rest. We have, therefore, the junior patent, which is held to

¹ Rev. St. U. S. § 2333.

defeat the prior patent, with no reference to any contest between the different claimants before the land office; and we have the court, in deciding the present case, while hearing the testimony which would defeat or sustain that patent, utterly ignoring it, and making no finding upon the subject which the defendants in error believe to be involved in the issue.

The reason of this action by the court is very plain. It proceeds upon the idea that it is conclusively presumed and found, from the face of the Sierra Nevada lode patent, that the said lode claim had been duly discovered, located, and recorded within the exterior boundaries of the land described in the said Moyer placer patent before the application for the said Moyer patent. As there is not a word said on the face of the Sierra Nevada lode patent on this subject, we must look for some inference of law, rather than to the statement of facts, upon which this presumption conclusively arises.

That presumption of law, as explained by counsel, is that since the law under which the Moyer patent issued reserved from its operation any known vein or lode within the exterior boundaries, it is presumed that, when the officers of the land department issued the patent for the Sierra Nevada lode, they made such inquiries into the question of the existence of this lode, and its being known to the grantee in the Moyer patent, as authorized it to decide that question, and that that decision is binding and conclusive forever upon all parties. We are not able to agree with this statement of the law. The proceedings in the land department for securing title to Government lands are usually *ex parte*. There is no general provision of law which requires a party who can make the necessary proofs, which on their face entitle him to purchase land from the Government, to call any individual as a contestant, or to notify other parties interested in the matter that he is about to proceed. Each one proceeds in his own manner, and establishes his own claim; and the officers of the Government, frequently, do not know that there is any other party claiming the same land, while there may be such a party who has also taken proper steps, and whose rights are superior to those

of the party presenting himself before the officers of the Government. It is this *ex parte* proceeding which is supposed to bind the claimants under the Moyer patent conclusively and forever in regard to their knowledge of the existence of this Sierra Nevada lode at the time they made application for their patent within its limits.

We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for land are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by a suit in chancery brought to set the grant aside. But those are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.

Where each party has a patent from the Government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts. We do not believe that the Government of the United States, having issued a patent, can by the authority of its own officers invalidate that patent by the issuing of a second one for the same property. If it be said that the question of the reservation of this vein as a known lode under the law on that subject makes a difference in this respect, and that the land office has a right to inquire whether such lode existed, and whether its existence was known to the patentee of the first patent, we answer that a patent issued under such circumstances to the claimant of the lode claim may possibly be such *prima facie* evidence of the facts named as will place the parties in a condition to contest the question in a court.

But we are of opinion that it is always and ultimately a question of judicial cognizance. The first patent conferred upon Moyer the right to this vein, and to all other veins within the limits of his fifty acres of placer claim. There is excepted from that grant any lode existing and known at the time application was made for his patent. Whether such a

lode did exist, and whether it was known to him, is a question which he has a right to have tried by a court of justice, and from which he can not be excluded by the subsequent action of the officers of the land department. It is not necessary to consider whether there may not be reservations of a character which could be thus disposed of by the proper land offices; for instance, a reservation of any land heretofore patented or granted to other parties. There is nothing there to decide, but to look at the records of the land office, and see whether any land within that boundary ever had been granted. A reservation of a specific boundary, laid down so as to be identified, in the first patent, needs no judicial action to determine what it is that is reserved.

But, in the present case, two facts, requiring judgment, discretion, knowledge of the law, and the balancing of testimony, are essential to the exercise of the right to grant the property to some other party. One of these, the existence of such a vein, is a question often of great conflict of evidence, requiring the weighing of testimony. The other—the most important of all, the most difficult to decide, the least likely to be decided correctly by *ex parte* testimony or in *ex parte* proceedings—is the question whether, if such mine existed, it was known to the party who applied for the patent at the time application was made. And, while we are not prepared to say at this time that the land officers can not, on a *prima facie* case, decide the right of the applicant to such vein, and give him a patent for it, we are satisfied that, in any conflict between the title conferred by two patents, whether it be in law or in equity, the holder of the title under the elder patent has a right to require that the existence of the lode, and the knowledge of its existence on the part of the grantee of the elder patent, should be established. Here we have a remarkable fact—the absence of any evidence of a contest before the land department on that subject, and of any hearing on the part of the owner of the elder title. We have no finding or assertion of the existence of such fact in the junior patent, or that it was established even by *ex parte* proceedings before the officers of the Government; and the introduction of evidence,

on the trial in this case, on that subject, was ignored as any part of the case on which the judgment of the court was based. It rests solely, and, as the court says, conclusively, on the presumption that the officers of the Government did their duty in the matter, and that what they decided is incapable of contradiction.

The case in this court bearing the nearest analogy to the one before us is that of *Railroad Co. v. Smith*, 9 Wall. 95, 99. By the act of September 28, 1850, all the swamp and overflowed lands belonging to the United States were given to the States within which they lay. The Secretary of the Interior was directed by the statute to ascertain and distinguish these lands, and certify them to the several States; and it has been repeatedly held by this court that the act itself was a present grant of all such lands. Congress subsequently, by the act of June 10, 1852, granted the right of way, and a portion of the public lands, to the State of Missouri, in aid of the construction of railroads. This grant was accepted by the legislature of Missouri, which, by a statute, vested the land granted in the Hannibal and St. Joseph Railroad Company, the company having located its road, whereby the even numbered sections and quarter sections granted to the State for the use of said road were ascertained. The railroad company, finding Smith, the defendant, residing upon and claiming one of these quarter sections, brought an action of ejectment to recover possession. Smith defended on the ground that the land was swamp land, and the title passed from the United States by the act of 1850, and could not be granted to the State of Missouri, or to the railroad company by the act of 1852. The latter act contained a reservation from the grant for the railroad of all lands theretofore conveyed or disposed of by the United States. Here, then, were two grants of the same lands by the United States; these grants operating as effectually as patents to convey title to the property described in them. It became necessary in the suit to ascertain which of these was the superior title. The elder grant, *prima facie*, to wit, the grant of the swamp lands to the States, which we have said was a grant *in presenti*, was the better title. But the question arose as to how it could

be shown that this was swamp land, within the meaning of the act of 1850, and therefore passed by that statute, and could not afterward be transferred by the act of 1852.

The act of Congress granting these swamp lands had made it the duty of the Secretary of the Treasury—a duty afterward transferred to the Secretary of the Interior—to ascertain what were swamp lands, and to make certificate of the fact to the States that were entitled to them. This duty had not been performed by either the Secretary of the Treasury or the Secretary of the Interior. There was no record or documentary evidence, therefore, by which the State claiming those swamp lands, or its grantee claiming under it, could establish the fact that the land which he was occupying was swamp land under the grant of 1850.

The case was brought in a State court of Missouri, and that court permitted Smith to show by parol evidence—the evidence of parties familiar with the land—that it was swamp and overflowed land at the time the grant of 1850 was made by Congress, and had been ever since; and on this testimony a judgment was rendered for the defendant Smith, which was affirmed by the Supreme Court of the State. From that court it was brought to this court by a writ of error. This court said that, “by the second section of the act of 1850, it was made the duty of the Secretary of the Interior to ascertain this fact (namely, whether it was swamp land or not), and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress; and, though the States might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department with the State officers, he must, if he attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to

cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims—a grant which was also a gratuity? The matter to be shown is one of observation and examination; and, whether arising before the secretary, whose duty it was, primarily, to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.”

The subsequent case of *French v. Fyan*, 93 U. S. 169, as shown by a careful reading of it, is not in conflict with this decision, because in that case, the secretary having acted upon the matter, and certified that the lands then in controversy were swamped and overflowed lands, it was not permitted, in a trial before a jury, to contradict this certificate by oral testimony. And in the still later case of *Wright v. Roseberry*, 121 U. S. 488, the principle we are stating is clearly laid down in a case almost identical with the present one.

It is urged upon us, in answer to this view of the subject, that, by sections 2325 and 2326 of the Revised Statutes, it is made the duty of a person seeking to avail himself of the discovery of a mineral lode, and obtain a patent for the same, previous to making the application for a patent, to file the survey and field-notes of the grant which he claims, and do certain other things showing him to be entitled to purchase the mineral land which he claims, all of which is to be under oath. The statute then declares that the register, upon the filing of such application, field-notes, etc., shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim, and at the end of this sixty days' publication, “if no adverse claim shall have been filed with the register and the receiver” of the land office, “it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard except it is shown that the applicant has failed to comply with the terms of this chapter.”

Section 2326 then proceeds to enact that, where an adverse claim is filed, it shall be upon oath of the person making the claim, and shall set out the boundaries, nature, and extent of such adverse claim; and all proceedings shall be stayed in the land office until the controversy shall be settled or decided by a court of competent jurisdiction. It makes it the duty of the adverse claimant, "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, * * * may file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment rolls to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

The argument we are considering assumes, as a matter of law, that all that was required of the owners of the Sierra Nevada claim, and all that was required of the register and receiver of the land office, in regard to these publications, was done and had, and that, therefore, the owners of the Moyer patent are concluded by the proceedings which are

thus supposed to have taken place. There are two substantial objections to this view of the subject. The first is that if such proceedings were had, and resulted either in the trial of the adverse claim before a court of justice, or in the failure of Moyer or anybody else to assert an adverse claim, those proceedings are matters of public record, and as, in this case, they must constitute the main reliance of those claiming under the Sierra Nevada patent, for the superiority of their title, this record should have been produced on the trial of the case; and that the mere opinion of the register and receiver of the land office as to what those proceedings are, and their effect upon the prior patent of Moyer, should not be substituted for the production of those proceedings themselves, copies of which were easily obtainable at the land office department.

Another reason, which we think more satisfactory, is that a careful examination of this statute concerning adverse claims leads us to the conviction that it was not intended to affect a party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States, had established his right to the land claimed by him, and received his patent, and was reposing quietly upon its sufficiency and validity. It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections, and the original statute from which they are transferred to the Revised Statutes, the words "claim" and "claimant" are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the Government by way of a patent; and the purpose of the statute seems to be that, where there are two claimants to the same mine, neither of whom has yet acquired the title from the Government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall

have the patent—the final evidence of title—from the Government. This view is consistent with the entire statute on the subject: and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims, and some other party, who is only setting up a claim to the same property.

In the first place, its inapplicability to the present case is shown by the requirement that in all cases the successful party shall pay five dollars per acre before he can get his patent. This argues that it has no reference to a placer patent, because, for the land conveyed by a placer patent, the party is only required to pay two dollars and a half an acre.

Again, the following language seems inconsistent with the idea that one of the contesting parties may already have a patent for the land in controversy, namely: "After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the courts, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, * * * and patents shall issue to the several parties according to their respective rights."

It is too obvious to escape comment that, by this proceeding, there are brought before the court adverse claimants to mineral land, and that the party who succeeds in establishing the superior right to the possession shall have

a patent. This may be the party who institutes the original proceeding, or it may be the party who sets up the adverse claim. Whichever of these two establishes his better right to the possession gets the patent. How can this apply to a case where one of the parties already has a patent? How can he be required to pay again for the land for which he has already paid all that the law requires? How can he be required to establish before the land office his right to the possession of a mine for which that office has already granted him a patent?

And again, how can such a case be brought within the terms of a statute which provides that, where "several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees," etc., "and patents shall issue to the several parties according to their respective rights." Why should a patent issue to a party for that for which he already has a patent? These expressions of the statute, so clearly applicable to parties who are only claimants and have no title, show what the purpose of Congress was in passing the law, and that it was not intended that a party who had already gone through all these proceedings, and established his right to the mine which he claims, and received his patent for it, shall be put upon the same level with mere claimants, who have yet to establish their claim and prove their right even to the possession, and that he is to be brought before a judicial tribunal to make a contest with a party who has no legal standing in court to contest with him who has the legal title from the Government.

And this is just and is sound policy. Why should a party who has the legal title from the Government of the United States, on which he relies with safety, be called upon to answer every adventurer who digs a hole in the ground thus conveyed to him, and asserts a right to mineral found in that ground? When he has once obtained the patent of the United States for his land, he should be only required to answer persons who have some established claim, and to contest with this party, not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property.

For these reasons, we do not believe that these sections, 2325 and 2326, are intended to apply to the case of a party who has a prior patent for the land which may be the subject of controversy before the register and receiver of the land office. Is it fair and just that the party who has gone through all the processes which the laws of the United States require of him to obtain title to its lands, and has obtained that title, shall be subjected by the officers of the Government of the United States to defend that title before them from the attacks of an outsider?

We have more than once held that, when the Government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the Government can be called to answer in regard to that patent before the officers of the land department of the Government: *U. S. v. Schurz*, 102 U. S. 378.

For these reasons, we are of opinion that the Circuit Court, in refusing to consider the testimony found in the case in regard to the known existence of the vein of the Sierra Nevada claim at the time of the application for the Moyer patent, was in error, and also that it was erroneous to hold that, on the face of the patent for the Sierra Nevada mine, the existence of this vein, and the knowledge of its existence, were to be conclusively presumed in this action. The judgment is reversed, and the case is remanded to the Circuit Court with a direction to grant a new trial.

MR. JUSTICE BREWER, with whom the CHIEF JUSTICE concurred, dissenting: I am unable to agree with the opinion of the court delivered by Mr. Justice MILLER.

A placer patent, and the statute under which it is issued, expressly provide that it shall not include any known lode or vein. So if, within the limits of placer ground, there be a vein or lode bearing gold or other mineral of precious value, and that vein or lode was known at the time of the application for the placer patent, it did not pass under the patent. It was as much excepted from its terms as though it were in an adjoining State. It was territory carved out by the

very language of the patent and the statute, and, not passing to the patentee, remained the property of the Government, and subject to location and patent as fully, and in the same manner and upon the same terms, as any other mineral vein. Suppose a patent for agricultural lands, by virtue of the statute, excepted all lakes, ponds, and other bodies of water. Who would doubt that the title to any lake or pond within the territory described in such patent remained in the Government, and subject to sale by it in any manner it deemed best, or that a title thereto obtained, in the manner prescribed by law, was paramount? So here. There is only one way and one tribunal provided for obtaining title to any vein or lode, whether within or without the limits of placer ground, and that is by application in the land office. That way was pursued in this case, and a patent obtained. Whether this lode or vein was or was not within the limits of the placer patent depends upon no matter of law, but upon two questions of fact: *First*, Was there a vein bearing gold or other precious mineral within the limits of the placer territory; and, *second*, Was it known at the time of the application for the placer patent. These two questions of fact determine the question whether the placer patent took the whole surface ground, and all veins and lodes within its territory. Provision is made by statute for putting such questions of fact in issue. The adverse proceedings prescribed by statute are of common occurrence. It is the ordinary procedure. We have had cases involving such procedure before us this term. But I fear that this decision is equivalent to holding that such statutory adverse proceedings amount to nothing, and are unworthy of notice. From *Johnson v. Towsley*, 13 Wall. 72, to the present time, the uniform ruling of this court has been that questions of fact passed upon by the land department are conclusively determined, and that only questions of law can be brought into court.

The right to this patent depends solely upon these two questions of fact, which were considered by the land office when the original patent was issued. I think that its determination upon them was conclusive.

I am authorized by the Chief Justice to say that he concurs in these views.

1. Pleading known lode in placer. *Sullivan v. Iron Co.*, 109 U. S. 550.
2. The reservation in a patent of lodes known to exist is valid and no title vests in the patentee as to such lodes. *Clary v. Hazlitt*, 87 Cal. 286.
3. Placer claimants own lodes afterward discovered. *Montana Co. v. Dahl*, 6 Mont. 181; *Raunheim v. Dahl*, Id. 167.
4. Failure to mark boundaries invalidates location. *Anthony v. Jillsen*, 16 M. R. 26.
5. Courts will not enforce a contract providing for the use of names of nominal locators taking up land in excess of the legal location. *Mitchell v. Cline*, 24 Pac. 164.
6. A lode may be known to exist and so be excepted, though it has not been located according to law. *Iron Silver Co. v. Mike & Starr Co.*, 12 S. C. Rep. 548.
7. The lode must be known to exist at the date of application for patent and not merely at the date of the patent. *Id.*
8. The knowledge must be that of the applicant; but he is chargeable with matters of notoriety, or such as are apparent from an examination of the ground. *Id.*
9. An applicant must be held to know of the existence of veins plainly disclosed in a long tunnel under the claim. *Id.*
10. A known lode, to be excepted, must be clearly ascertained and of value to justify its exploitation, and the question of such value is for the jury. *Id.*

FRANK MORITZ, Respondent, v. A. LAVELLE, Appellant.

(77 California, 10; 18 Pac. 803; 11 Amer. St. Rep. 229. Supreme Court, 1888.)

¹ **Verbal agreement enforced.** Plaintiff outfitted defendant to relocate an abandoned mine. The relocation was made in defendant's name, with verbal agreement to transfer one-half to plaintiff in pursuance of the original understanding. *Held*, that such contract was not within the statute of frauds and was enforceable.

Averment of citizenship. In complaint to enforce the trust in such a case the plaintiff is not bound to allege his citizenship.

Pleading conditions performed. The general allegation that plaintiff has performed all and singular his agreement and covenants with defendant is a sufficient averment of the performance of conditions precedent.

In bank; appeal from Superior Court, Tulare County;
WILLIAM W. CROSS, Judge.

Action by Frank Moritz against A. Lavelle for specific performance of contract. Judgment for plaintiff, and defendant appealed.

W. A. GRAY and OREGON SANDERS, for appellant.

W. B. WALLACE, for respondent.

PATERSON, J.

The plaintiff and defendant entered into a verbal agreement to occupy and relocate a mine in Tulare County for their joint use and benefit. The plaintiff promised to pay all the expenses of the defendant, and furnish him with an outfit necessary to make the trip from Calaveras County to Tulare County, and to make the necessary examination of the mine; to pay the defendant's board for a certain time, and furnish him with provisions, clothing, and blankets. It was agreed that if the mine had been abandoned, the plaintiff should join the defendant at the mine, and assist in working the same. Pursuant to the agreement, the plaintiff furnished the defendant with all he had promised to furnish him. The

¹ *Treat v. Hiles*, 82 N. W. 517.

defendant visited the mine, found that it was abandoned, notified the plaintiff of the fact, and the plaintiff joined him thereafter at the mine. The parties staked off the mine, erected the necessary monuments, completed the relocation of the mine by placing notices of relocation thereon, as required by law. These notices were signed by the defendant alone as locator, and by plaintiff as a witness, with the express oral agreement between them that, in consideration of the agreement which we have referred to, the defendant would transfer and deed to the plaintiff the undivided one-half interest in and to the mine. The parties thereafter commenced working the mine, and the plaintiff demanded a transfer to him of the undivided one-half interest which the defendant had promised to convey. The defendant refused to make a conveyance of any interest, and denied that plaintiff owned any interest therein, and forcibly expelled him from the mine. The court below gave judgment for the plaintiff, as prayed for, namely, that defendant execute and deliver to the plaintiff a deed transferring the undivided one-half interest in and to the mine.

It is claimed that there having been no agreement in writing, and no such part performance as will take the case out of the statute of frauds, the contract can not be enforced. But the statute of frauds has no application in cases of this kind. In *Gore v. McBrayer*, 18 Cal. 582, Gore, McBrayer and others entered into an oral agreement to prospect for quartz. The court there held that the statute of frauds, which requires an instrument in writing to create an interest in land, does not apply to the taking up of mining claims. In *Settembre v. Putnam*, 30 Cal. 490, it was held that where mining partners, under a verbal agreement, claim and develop a lode upon the land of another, and authorize one of their number to buy the claim for the benefit of all, and he procures a deed in his own name, he holds the legal title to the interest of his partners in trust for them. See, also, *Sandfoss v. Jones*, 35 Cal. 487; *Hirbour v. Reeding*, 3 Mont. 13; *Murley v. Ennis*, 2 Colo. 300; *Welland v. Huber*, 8 Nev. 203.

It was not necessary for the plaintiff to allege citizenship in his complaint: *Thompson v. Spray*, 14 Pac. Rep. 182.

The complaint alleges "that plaintiff has performed all and singular his agreements and covenants with defendant." This allegation is sufficient, we think, as to the performance of conditions on his part: *Cal. Navigation Co. v. Wright*, 6 Cal. 258.

The demurrer to the complaint, therefore, was properly overruled, and the plaintiff was entitled to judgment.

Judgment affirmed.

WE CONCUR: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.

1. A working deed of mining privileges construed as a lease and held not assignable, the personal skill of the miners (grantees) being contracted for. *Hodgson v. Perkins*, 5 S. E. 710.

2. If one of the associates quit before mineral is struck he can not claim an interest in the perfected location made by the party continuing to work. *McLaughlin v. Thompson*, 20 Pac. 816.

JOHN McCAHAN ET AL. V. H. S. WHARTON ET AL.

(121 Pennsylvania State, 424; 15 Atl. Rep. 615. Supreme Court, 1888.)

¹ **Construction of agreement to admit a future fact.** A provision in an ore lease that if the lessees did not quit possession and surrender the leasehold on or before July 1, 1884, "the very act of their refusing or neglecting to quit possession and surrender this lease is hereby agreed on their part that there is a sufficient quantity of ore on said property to pay the royalty of \$1,200, on February 1, 1885," etc., is not to be held conclusive upon the lessees.

Lessee not estopped by admission but compelled to assume burden of proof. Such provision in the lease was to be construed as an admission which threw upon the lessees the burden of proving that there was not ore in paying quantities, upon the leasehold; and if not there, the lessees were not liable for the stipulated minimum royalty.

Where notice is given to an alleged agent not authorized to receive it, but such person communicates the notice to the proper party, the agency or authority of the person originally notified becomes then immaterial.

Error to Court of Common Pleas, Huntingdon County; A. O. FURST, Judge.

Covenant by John and Thomas S. McCahan against Henry S. Wharton and Franklin H. Lane upon a mining lease, by plaintiffs to defendants, the material parts of which are as follows: "The parties of the second part agree to push on and prosecute vigorously the work of digging and prospecting for iron ore on the above mentioned premises, and just as soon as iron ore is found in sufficient quantities to justify the shipping of the same, then the parties of the second part agree to work the said mines to their utmost capacity, and * * * to pay to the said John McCahan and Thomas S. McCahan * * * the sum of fifty cents per ton, for each and every ton of iron ore mined and shipped from the above mentioned premises; * * * and the said parties of the second part further agree * * * to thoroughly develop the iron ore deposits on the above described premises, and, in case sufficient iron ore be found, that then the mining and shipments of iron ore shall not

¹ *Pendill v. Union M. Co.* 81 N. W. 100.

be less than 2,500 tons per year; and that the royalty, if sufficient iron ore be found, shall in no event be less than \$1,200 for each and every year during the continuance of this agreement. * * * And it is further understood and agreed that if the parties of the second part do not quit possession of said premises, and surrender and give up all interest they may have in this lease on or before the first day of July, A. D. 1884, the very act of their refusing or neglecting to quit possession, and surrender this lease, is hereby agreed on their part that there is a sufficient quantity of iron ore on said property to pay the royalty of \$1,200 on the first day of February, A. D. 1885. * * *” The action is brought for the last mentioned \$1,200, with interest from February 1, 1885. Judgment was entered on a verdict for defendants, and plaintiffs bring error.

PETRIKIN & McNEIL, for plaintiffs in error.

R. M. SPEER and J. R. SIMPSON, for defendants in error.

PAXSON, J.

We are asked not only to reverse this case without a *venire*, but also to enter a judgment for the plaintiffs. Just how we are to do this, in view of the fact that there was a verdict for the defendants below, we are not informed. There is the further difficulty that this was an action of covenant, and the *narr.* is not printed in the paper book of plaintiffs in error, as required by the rules of court. We do not know, therefore, with any certainty, what breaches of covenant were assigned, nor what the issue was in the court below. We might guess at it, but that is not our province.

We would hesitate to reverse a case so defectively presented, and might well affirm the judgment for this reason. A careful examination of it as presented, however, fails to disclose any substantial error. It is true the learned judge below fell into a slight inaccuracy in that portion of his charge in which he said that “no other covenant preceding this one required them to develop the iron ore.” This, however, was entirely harmless, as the entire cove-

nants in the lease were submitted to the jury in a manner free from objection. If the defendants' witnesses are to be believed, there was not ore enough on the property to justify the defendants in expending any money upon it. There was also evidence that within the time limited the defendants abandoned the property, and so notified the plaintiffs. It was immaterial that the notice was given to the attorneys of plaintiffs, as one of the plaintiffs admitted when upon the witness stand that he had been informed of the notice by the attorney in question. Under these circumstances, no question of the authority of the attorney arises, and the plaintiffs' repudiation of it is not material.

Nor do we think the court committed any error in its construction of that part of the agreement which refers to the failure to give up possession of the premises by July 1, 1884, as evidence that there was sufficient ore on the premises to pay the royalty. The learned judge held this not to be conclusive, but an admission which threw the burden of proof upon the defendants to show that there was not ore there in paying quantities. The defendants assumed this burden, and succeeded in convincing the jury that the ore was not there. And if it was not there the plaintiffs could not be required to pay the royalty, under *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144, and other cases there cited.

Judgment affirmed.

1. Lessees agreed to pay a certain sum per ton for clear merchantable coal, exclusive of waste, that would pass through a half-inch mesh. At that time such sizes of coal were considered worthless, but afterward the lessee sold coal which would pass through such mesh: *Held*, that the same royalty was payable on such coal. *Genet v. Del. Co.*, 12 N. Y. Sup. 572.

2. Royalty is not rent, but part of the *corpus*. *Duffs' App.*, 14 Atl. 364.

3. A coal lessee agreeing to pay so much royalty per ton on screened coal is not obliged to pay royalty on slack. *Dunham v. Haggerty*, 110 Pa. St. 560.

4. Meaning of "screened coal" considered as part of law and part of fact. *Id.*

5. Receipts for royalty do not estop lessor where the lessees omitted to screen coal which should have been screened and paid for. *Id.*

6. Royalty accruing under a receivership is a first charge. *Allison v. Coal Creek Co.*, 9 S. W. 226.

7. Lessee of trust land paid the trustee royalty, supposing the coal

came from the trustee's private land: *Held*, no payment as against the successor of the trustee. *Ormsby Coal Co. v. Bestwick*, 18 Atl. 538.

8. Construction of covenant for payment of different royalties on lump and nut coal. The proportions of each produced on neighboring lands no proof of what might have been done on the demised land. *Id.*

9. A lessee can not maintain a bill for the construction of a mining lease as to the amount of royalty to be paid by him. *Lake View M. Co. v. Hannon*, 9 So. 539.

WILLIAMS V. GIBSON.

(84 Alabama 228, 4 So. Rep. 850; 5 Am. St. Rep. 868. Supreme Court, 1887.)

Minerals in place are parcel of the freehold and constitute landed property capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament which is the subject of a distinct inheritance.

It is only when minerals are severed from the soil that they become personal chattels.

¹ **When an incorporeal right exists.** It is only where the right to mine is not exclusive that it may be classed as an incorporeal right or easement in the nature of a license.

² **Necessary surface use implied.** Express grant of all minerals or mineral rights in tract of land is, by necessary implication, the grant also to open and work the mines, and occupy so much of the surface as may be reasonably necessary for such purpose. And this implied right to occupy so much of the surface as may be needed to open and work the mines is not limited, but rather strengthened, by the special grant of certain timber and water privileges, and of the right of way to and from the mines.

³ **The estates being severed, each must respect the other.** Owner of minerals and mining rights must use his own so as not unreasonably to injure his neighbor, the owner of the surface or soil; and must so conduct his mining operations as to leave a sufficient support for the surface.

Extent of surface use a jury question. What improvements are reasonably necessary for the profitable and beneficial working of a mine, and to what extent the surface may be reasonably occupied for this purpose, are questions of fact for the jury.

No right to build coke ovens. In ejectment for the surface of a tract of land out of which minerals had been granted, evidence as to how much of the surface was or might be needed for the erection of coke ovens is properly excluded, the grant conveying no right to use the land for that purpose.

Company store—Evidence of custom excluded. In ejectment for the surface of land used in working a mine it is incompetent, for the purpose of proving the extent of land necessarily occupied, to show that particular individuals in the neighborhood carried on a mine without a store-house for supplies, where the business of mining in the vicinity is of too recent date to establish a custom.

Company store. In ejectment for the surface of land used in working a mine, where it appeared that defendant had established a supply store, it is not error, for the purpose of testing the necessity of

¹ *Reynolds v. Cook*, 88 Va. 817; 5 Am. St. R. 817.

² See note to *McClintock v. Bryden*, 63 Am. Dec. 100.

³ *Williams v. Hay*, 14 Atl. 879; *Gumbert v. Kilgore*, 6 Atl. 771.

occupying the land for such purpose, to show that two other stores were located near the mine.

Rental value. In ejectment for the surface of land used in working a mine, evidence of the value of improvements made by defendant on the land in controversy is relevant as affecting its rental value.

A verbal contract for the purchase of land, having never been reduced to writing, nor accompanied by payment of any part of the purchase price, is within the statute of frauds, and confers no rights which would prejudice the parties to an ejectment suit for the land.

Appeal from Circuit Court, Walker County; S. H. SPORR, Judge.

This was an action in the nature of ejectment under the statute, brought by appellee, Gibson, for the "surface" of certain lands out of which the "minerals," etc., had been previously granted, described in the complaint as follows, viz:

"The northeast quarter of southwest quarter, and all of that part of the southeast quarter of southwest quarter situate or lying north of the Georgia Pacific Railway, section 28, township 15, range 9 west, situate in said county of Walker, State of Alabama, except all the coal and other minerals in, under and upon said lands; and also except all timber and water upon the same, necessary for the development, working and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; also the right of way and the right to build roads of any description over the same, necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said land all material and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market."

The plaintiff derails title to the "surface," as above described, from Green B. Frost; and likewise, the defendant derails his title to the "minerals," etc., from the same ancestor, through several mesne conveyances.

The witness Smith, mentioned in the last paragraph of the opinion, was one of the intermediary owners of the mineral rights, etc., between said Frost and appellant Williams. Williams disclaimed all interest in the surface property sued for, excepting three acres, with the structures thereon erected.

There was no evidence that any part of said three acres had

coking ovens erected thereon, or that appellant was occupying any part thereof for such ovens.

McGUIRE & COLLIER and WEBB & TILLMAN, for appellant.

HEWITT, WALKER & PORTER, for appellee.

SOMERVILLE, J The present suit, which is one of ejectment under the statute, involves a controversy between the superjacent and subjacent owners of land upon which there is a coal mine, opened and in process of being worked by the defendant. The plaintiff, Gibson, is the owner of the surface, and the defendant, Williams, of the "coal and other minerals," with certain incidental and other rights, derived through various mesne conveyances from one Green B. Frost, the original owner in fee simple of the premises.

In November, 1881, Frost conveyed to one Peters "all the coal and other minerals in, under and upon" these lands, which are fully described in the deed; "and also all timber and water upon the same, necessary for the development, working and mining of said coal and other minerals, and the preparation of the same for market, and the removal of the same; and also the right of way, and the right to build roads of any description over the same, necessary for the convenient transportation of said coal and other minerals from said land, and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removal of said coal and other minerals, or in the preparation of the same for market." Subsequently, in August, 1884, Frost conveyed the same lands to one C. L. Frost and J. B. Reeves, reserving by exception from the land sold, the mineral rights and other interest previously conveyed to Peters, using the same language of description adopted in the deed to him. The defendant is shown to have acquired by deed, through sundry mesne conveyances, the precise interest which Peters owned.

This interest may be briefly described under three general heads: (1) A grant of all the coal and other minerals upon or in the land; (2) so much of the timber and water on the land as may be necessary (a) for the development, working,

and mining of the coal and other minerals, and (b) for the preparation of the same for the market, and their removal from the soil and the premises; (3) the right of way, by roads of any description, to and from the lands, so far as may be necessary for the transportation of all minerals mined, and of materials and implements needed in the business of mining and the preparation of the minerals for market.

The material question is what, if any, surface rights pass to the grantee under the first head, which is a grant of all the coal and other minerals upon and in the land.

This is dependent in some measure upon the nature and characteristics of the thing granted. Minerals which are unsevered from the soil, or, as sometimes said, which are "in place," are parts of the freehold, and constitute landed property. They are capable of a possession distinct from that of the surface, and may form a separate corporeal hereditament, which is the subject of a distinct inheritance. The title of the soil, as such, including the surface, may be vested in one person; and that of the mines and minerals on it in another. It is only when the minerals are severed from the soil that they become personal chattels, and it is only where the right to dig or to mine them is not exclusive that it may be classed as an incorporeal right or easement merely in the nature of a license. *Bainb. Mines* (Amer. Ed.), *3, *261; *Massot v. Moses*, 3 S. C. 168; 16 Amer. Rep. 697; *Caldwell v. Fulton*, 31 Pa. St. 475; *Melton v. Lambard*, 51 Cal. 258; *Ryckman v. Gillis*, 57 N. Y. 68; 15 Amer. Rep. 464.

The express grant of all the minerals or mineral rights in a tract of land is, by necessary implication, the grant also to work them, unless the language of the grant itself repels this construction. This is the result of the familiar maxim that "when anything is granted, all the means of obtaining it, and all the fruits and effects of it, are also granted:" 1 Shep. Touch. 89; 11 Coke, 52a.

This involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and of the improvements in the arts and sciences, but with-

out injury to the right of support for the surface or superincumbent soil in its natural state: *Marvin v. Brewster M. Co.*, 55 N. Y. 538; 14 Amer. Rep. 322; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242; Bainb. Mines, *35, *62, *63.

It is said by a standard English author, touching this subject: "The right to work mines is so inseparable from the grant of them that it has been expressly decided, not only that the right to enter and work mines is necessarily incident to the grant of mines, without any express authority for that purpose, but that this power can not be restrained by a special power given in the affirmative, which would authorize more acts than would be implied by law, but which will in no wise exclude the full operation of the law." Bainb. Mines (Amer. Ed.) 34, 35.

It is contended that this incidental right to work the mines on the land is limited by the special grant of certain timber and water privileges, and of the right of way to and from the mines, and that the mention of these privileges under the maxim, *expressio unius, est exclusio alterius*, would rebut the grant of any right to occupy the surface of the soil for miners' houses, or other like purposes. It is often said that great caution is frequently necessary in the application of this maxim and of its twin legal aphorism of synonymous meaning, *expressum facit cessare tacitum*: Broom, Leg. Max. *506.

It is obvious that without the right of surface occupation to some extent the grant in question is rendered nugatory. The principle is well settled that one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations: *Turner v. Reynolds*, 23 Pa. St. 199; *Rogers v. Taylor*, 38 Eng. Law & Eq. 574; *Railroad Co. v. Railway Co.*, 75 Ala. 524, 525. To construe away this right would be to construe away the grant itself, which can not be enjoyed without it.

It is our opinion that the enumeration of these special privileges was not intended to exclude another which was absolutely necessary to the very life of the grant itself. The right to use timber would not pass by implication: Bainb. Mines, *64. This was, therefore, the acquisition of a new

and valuable right. The right of way and water privileges were also more comprehensive, possibly, than would have been yielded pacifically by mere construction. At any rate, these several grants themselves necessarily imply the right to occupy so much of the surface as might be needed to open and work the mines.

There could be no use of timber, or water, or right of way, except in connection with working the mines, and there could be no working of the mines without an occupation of the surface in the vicinity of the shafts, slopes, or other requisite openings. These specifications strengthen, rather than repel, the implication in question: *Marvin v. Brewster M. Co.*, 14 Amer. Rep. 329, *supra*; *Bainb. Mines*, *34, *35.

The owner of the minerals and mining rights must use his own so as not unreasonably to injure his neighbor, the owner of the surface or soil; and it is, we repeat, now settled by the authorities quite universally that he must conduct his mining operations so as to leave a sufficient support for the surface: *Carlin v. Chappel*, 101 Pa. St. 348, 47 Amer. Rep. 722, and cases cited; *Harris v. Ryding*, 5 Mees. & W. 69; *Rog. Mines*, 455. In other words, the exclusive grantee of minerals in lands is entitled to dig and carry away so much of them as he can excavate from the soil without injury to the surface owned by the grantor; the mining right being servient to the surface to the extent of sufficient supports to sustain it in its natural state: *Jones v. Wagner*, 5 Amer. Rep. 885. But he is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of his mines, not injurious to the surface, as, for example, the loss of springs by the owner of the soil (*Coloman v. Chadwick*, 80 Pa. St. 81, 21 Amer. Rep. 93); or the disturbance of the peace and comfort of the surface owner's dwelling by necessary blasting in the mines: *Marvin v. Mining Co.*, 14 Amer. Rep. 322.

These incidental rights of the miner, which are appurtenant to the grant of the mineral rights, are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and

modes of mining, and establish such auxiliary appliances and instrumentalities, as are ordinarily used in such business and may be reasonably necessary for the profitable and beneficial enjoyment of his property. But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention: *Bainb. Mines*, 63, 64; *Marvin v. Mining Co.*, *supra*. It has been accordingly held in England that a reservation of mines of coal (which is usually the same, in legal effect, as a grant), with rights of way for transportation, involved the right to construct a modern railway, although this mode of transportation was unknown at the time of the grant. The ground of the decision seems to have been that, without use of the railway for shipment, the mines could not, under the evidence, have been worked beneficially or with reasonable profit.

We do not construe the language of the present grant or reservation, as it appears in the deeds of the plaintiff and those under whom he claims, to confer any right, by implication or otherwise, to use the surface of the land for the purpose of erecting coke ovens, designed for the conversion of coal into coke. His only right is to mine and transport coal in its first marketable state. The contract clearly contemplated nothing else. Such is the usual construction placed upon similar grants; the principle being thus stated by *Bainb. Mines*, 63: "An owner of that kind can not use the surface or any of the materials of the land for changing the character of the mineral to which he is entitled, as for converting coal into coke, clay into bricks, or for smelting the metallic ores, much less for any further purpose of manufacture."

The evidence shows that the defendant claimed the right to occupy as much as three acres of the surface of plaintiff's land as incident to his grant. Upon this area he had erected five two-story frame miners' houses, four log cabins for the occupancy of employes, an air-shaft for conveying smoke from and ventilating the mines, a powder-house for keeping powder used for blasting, a blacksmith shop, and a store house for furnishing the miners with supplies. Which

of these improvements are reasonably necessary for the profitable and beneficial working of the mines is a question of fact to be determined from the evidence by the jury; and so, likewise, the inquiry as to how much of the surface of the land may be reasonably needed for this purpose. It may be that other suitable lands, conveniently situated, could be obtained at a reasonable price for the site of the miners' houses, the cabins, and the store; or the contrary may be true. It may be that the mine was so far distant from the market for supplies, and that prices in neighboring stores were so extravagant, as to render necessary the establishment of a supply store, both for the economy of time and money of the employees. It may be that such a store was a mere convenience, and not a necessity, within the meaning of the law, for this necessity can not be deemed to exist if a similar privilege can be otherwise secured by reasonable trouble and expense. *O'Rourke v. Smith*, 23 Amer. Rep. 446, note; Tied. Real Prop. §§ 606, 609. These and other like considerations it would be proper for the jury to consider in solving the question of necessity—a word of relative import, which may mean, on the one hand, less than imperative need, and, on the other, more than mere suitable convenience.

It is manifest that the rulings of the Circuit Court are not in harmony with these views, including both the instructions to the jury and the rulings on the evidence.

The defendant should have been permitted to show to what extent his occupancy of the surface of the lands around the opening of the mine was reasonably necessary, under the above rules, to the prosecution of the mining business.

The evidence as to how much of the surface was or might be needed for the erection of coke ovens was properly excluded.

It was not competent to show that particular individuals in the neighborhood carried on a mine without a storehouse for supplies, although a usage in the matter by other miners similarly situated might be relevant if it had prevailed sufficiently long, and possessed the other requisite characteristics of an established custom. But the

business of mining in this particular part of the State is probably of a date too recent at this time to give such a custom the age necessary to its validity.

The court did not err in allowing evidence to be introduced showing that two other stores were located near the mines. It was quite as relevant to show that there were two stores near by as that there were a hundred, with a view of testing the urgency of the alleged necessity impelling the defendant to establish one for his own needs. The two cases differ only in degree, not in kind.

The value of the improvements erected by the defendant around the mines was relevant as affecting the rental value of the three acres of land sued for, the defendant being liable for rent by way of use and occupation in the event of plaintiff's recovery.

The verbal contract of purchase, which the witness Smith testifies he made, of part of the surface in controversy, from Frost & Reeves, who sold to the plaintiff, was never reduced to writing, nor accompanied by a payment of any part of the purchase money. It was, therefore, void under the statute of frauds, and could confer no rights on the alleged purchaser which would prejudice those of either party to the present suit.

The judgment is reversed, and the cause remanded.

1. Owner of surface only is a trespasser if he remove minerals. *Ashman v. Wigton*, 12 Atl. 74.

2. Right of mineral owner to sink shaft and otherwise use surface. *Wardell v. Watson*, 5 S. W. 605.

THOMAS H. FULLER ET AL. V. THE SWAN RIVER
PLACER MINING CO.

(12 Colorado, 12; 19 Pac. 886. Supreme Court, 1888.)

¹Relief in chancery. The covering up of claims with tailings, rendering their development and the ascertainment of their value impossible, is a wrong for which the law affords no adequate remedy, and therefore equity has jurisdiction.

Custom to let tailings go, invalid. Under Gen. St. Colo. § 2893, a miner must take care of his tailings on his own property, and evidence of a custom of miners to dump their tailings upon their own grounds, and let them take care of themselves, is insufficient to prevent the issuing of an injunction against the washing down of tailings on plaintiff's claim, where the consent of plaintiff to the acts complained of is not shown.

Value unascertainable. Where an injunction is sought against interfering with the development of plaintiff's mining claim, it is no objection that it does not appear how valuable plaintiff's claims are, it being impossible to estimate their value until their character has been demonstrated by development.

²Laches. Where the diversion of water from plaintiff's mining claim is sought to be enjoined, it is no objection to relief that the building of the flume, by means of which the water was diverted, was begun more than five years before suit, where the particular diversion complained of occurred within a few months of the action.

Change of use or point of diversion. One who has acquired the right to divert the waters of a stream may change the point of diversion and place of use without losing his right of priority, where the rights of others are not injuriously affected.

Commissioners' decision. Error to District Court, Jefferson County.

This action was brought by several complainants to enjoin an alleged wrongful diversion and use of the waters of the South Swan and Middle Swan rivers by the plaintiffs in error, and to recover damages for such wrongful diversion and use. The defendant in error has succeeded to all the rights of the complainants in the original bill.

By the decree entered the plaintiffs in error are perpetually enjoined from diverting from the natural course and channel thereof any of the waters of the South Swan river,

¹ *Clifton Iron Co. v. Dye*, 6 So. 192.

² *Bowman v. Patrick*, 36 Fed. 139.

or of the tributaries thereof, except 250 inches thereof, which, before the 10th day of June, 1870, had been diverted by the ditch known as the "South Swan" or "Pollard" ditch, and 127 inches thereof, which, before the 10th day of June, 1870, had been diverted by the ditch known as the "American Ditch;" and from diverting any of the waters of the Middle Swan river, except 100 inches thereof, which, before the 10th day of June, 1870, had been diverted by a certain flume, known as the "Stevens Flume;" and from diverting any of the said waters save by means of the said American ditch, Pollard ditch and Stevens flume. Plaintiffs in error were also enjoined from in any way or manner causing any logs, stumps, roots, rocks, gravel, tailings, or sediment to be washed or sent down into the waters of the South or Middle Swan rivers, or upon or into the flumes, sluices, pit, ditches, or other works used, or which shall be used by the defendant in error upon its premises, described in said decree, or upon said premises, otherwise than as prior to the 10th day of June, 1870, was wont to be practiced by those using and enjoying the said Pollard ditch, American ditch, and Stevens flume.

G. B. REED, WILLARD TELLER, and M. B. CARPENTER, for plaintiffs in error.

WELLS, SMITH & MACON, for defendant in error.

RISING, C. (after stating the facts as above). It is urged by plaintiffs in error that the evidence is insufficient to sustain the findings of fact upon which the decree is based, and particularly as to the amount of water that had been appropriated by the Pollard ditch, the American ditch, and the Stevens flume prior to the 10th day of June, 1870, and as to the custom of miners to dump their tailings upon their own ground, and let them take care of themselves.

We have carefully examined the evidence, and think it well sustains the finding of the court, as to the amount of water appropriated by said ditches and flume by a beneficial use thereof. The existence of the custom claimed by plaintiffs in error is not established by the evidence. By section 2393 of the General Statutes then in force it is provided

that no person shall be allowed to flood the property of another person with water, or to wash down the tailings of his sluice upon the claim or property of other persons, but that it shall be the duty of every miner to take care of his own tailings, upon his own property, or become responsible for all damages that may arise therefrom. Any evidence which fails to show that defendant in error consented to the commission of the acts complained of is insufficient to confer any right to commit them.

It is claimed by plaintiffs in error that the mining claims of defendant in error have little or no value for mining purposes, and that, by reason of such fact, the case made by it for relief is barren of equity.

While it does not appear from the evidence how valuable the claims of defendant in error are, it does appear that they are considered to be valuable placer claims, bearing gold in paying quantities, and that the work that was interfered with by the acts complained of was being prosecuted by defendant in error for the purpose of their development; and it also clearly appears from the evidence that, until the character of the claims has been demonstrated by development, their value can not be estimated.

There is no evidence upon which to base a comparison of values between the claims of plaintiffs in error and the claims of defendant in error, and, if there was, such comparison could not be considered in determining the rights of the parties.

If the claims of defendant in error are shown to be of any value, its rights therein, and to the water it has appropriated, must be protected.

It is urged by plaintiffs in error that this action ought not to be maintained because of the delay of the complainants in applying for relief, and the argument of counsel for plaintiffs in error in support of this claim is based upon the fact that the building of the flume, by means of which the wrongful diversion of water, and its wrongful use, as complained of, were made, was commenced in 1871—more than five years before this suit was brought.

It does not appear from the evidence that plaintiffs in error diverted or used any of the waters of South Swan or Middle Swan rivers, to the detriment of the complainants,

until September, 1876, and this action was commenced in December, 1876. Complainants were not required to institute proceedings to restrain the building of the flume, and are not estopped from maintaining this action by reason of their neglect to institute such proceedings, and there is no evidence in the case upon which an equitable estoppel can be based.

It is further urged by plaintiffs in error that defendant in error is not entitled to the equitable relief awarded by the decree, for the reason that there is a full, complete and adequate remedy at law for the wrongs complained of. We do not think this claim is sustained by the facts.

An action at law would not furnish any remedy for the injuries complained of. From the nature of the case it would be an utter impossibility to show the extent of the injury to an undeveloped mining claim by acts which render the development of such claim an impossibility. From the nature of the injury, and by reason of its continuous character, the legal remedy is inadequate. 3 Pom. Eq. Jur. § 1351, and note.

In the argument of counsel other objections are made to the decree, in regard to which we think it is sufficient to say that the findings of fact by the court are well sustained by the evidence, and that the decree is sustained by such findings, and is in accordance with the law applicable to the case, except as to the provisions of the decree, which we will now proceed to consider.

By one of the provisions of the decree plaintiffs in error were enjoined "from diverting any of the waters [of the South Swan and Middle Swan rivers] save and by means of the American ditch, Pollard ditch, and the Stevens flume, with the same capacity and grade as the same were and were wont to be used on or before the 10th day of June, 1870."

It is contended by plaintiffs in error that this provision of the decree prohibits them from changing the point of diversion of the water they have the right to use, and that it prohibits them from using such water in any manner except as originally used by them and their grantors, and that it is clearly wrong in this respect. We think the construction placed upon this provision of the decree by plaintiffs in error

is warranted by the language used. It has been decided by this court, in *Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901, that the point of diversion may be changed without affecting the right of priority, where no change is made in the quantity of water diverted, and no one is injured by the change. In that case the use, and the place where used, were the same after the change as before. The question is now presented whether such change in the point of diversion can be made for the purpose of changing the place of the use.

The Supreme Court of California has had this question before it several times, and a review of some of the cases will show the holding in that State, and the reasons given therefor. In *Macris v. Bicknell*, 7 Cal. 262-264, it was held that "a party who makes a prior appropriation of water can change the place of its use without losing that priority as against those whose rights have attached before the change," and this decision was based upon the fact that the adoption of any other rule would destroy the utility of the appropriation. In *Kidd v. Laird*, 15 Cal. 162-180, it was held that the rights of an appropriator to the water of a stream are strictly usufructuary, and, upon a review of some of the common law authorities relating to the rules of law by which such rights are governed, the court, with reference to the rule applicable to a change of the place of diversion and a change of use, said "that in all cases the effect of the change upon the rights of others is the controlling consideration, and that, in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper."

In *Mining Co. v. Morgan*, 19 Cal. 609-616, it was again held that the right to change the point of diversion was absolute and unqualified, except as limited by the condition "that the change must not injuriously affect the right of others." In *Davis v. Gale*, 32 Cal. 27, the court, in speaking of the rights of an appropriator of water, say: "Appropriation, use and non-use are the tests of his right; and place of use, and character of use, are not. When he has made his appropriation, he becomes entitled to the use of the quantity which he has appropriated at any place where he

may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and most materially impair the value of water rights and privileges."

The rule, as here announced, seems to make the right to change the point of diversion and use absolute and unqualified. In *Water Co. v. Powell*, 34 Cal. 109, it appears that plaintiffs, as prior appropriators, diverted the water of Shady creek by means of a dam across the creek, and that the dam became filled by the deposits of tailings from workings above, and when the dam became so filled, the plaintiffs raised the same from time to time, until, by reason of the dam being so raised, the water set back upon mining claims of defendant, and interfered with the working thereof.

Defendant destroyed the dam, and plaintiffs, by this action, sought to restrain defendant from further interfering with the dam. The court instructed the jury, in substance, that if it became necessary for plaintiffs to raise the dam to turn the water into their ditch, they had the right so to do, notwithstanding any damage caused thereby to defendant. This instruction was held to be erroneous, and the case has been cited as an authority against the rule permitting a change to be made in the point of diversion.

An examination of the opinion will disclose the fact that, while some of the language used seems to warrant the inference that the right to change is denied, the decision is based upon the fact that, by reason of the injury alleged to be caused to defendant by the change, the act of the plaintiffs became a nuisance, so that the ruling in this case upon the facts seems to be in full accord with the rule laid down in *Kidd v. Laird*, and *Mining Co. v. Morgan*, in so far as the absolute and unqualified right to change the point of the diversion is limited by these cases to changes that will not injuriously affect others.

In *Junkans v. Bergin*, 67 Cal. 267-270, 7 Pac. Rep. 684, the opinion contains the following statement relating to the right to change the point of diversion: "Undoubtedly one entitled to divert a quantity of water from a stream may take the same at any point of the stream, and may change the point of diversion at pleasure, if the rights of others be

not injuriously affected by the change." In this case it was held that the change made might injuriously affect the defendants.

It seems to be well settled by these decisions that a prior appropriator of water from a stream may change the point of diversion and the place of use without affecting his rights of priority, and all the cases reviewed, except the case of *Davis v. Gale*, make the right to make such change dependent upon the condition that the change shall not injuriously affect others. We think that the rule announced in *Kidd v. Laird*, "that, in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper," is the only rule under which the rights of the prior appropriator can be fully exercised, and his rights, and the rights of all other persons, fully protected. The right to change, so limited, includes the point of diversion, and place and character of use.

It follows from these views that the decree should be modified by striking therefrom the following portion, to wit: "and from diverting any of the said waters, save and by means of the said American ditch, Pollard ditch, and Stevens flume, with the same capacity and grade as the same were and were wont to be used on or before the 10th day of June, 1870; and from in any way widening or deepening said American ditch, Pollard ditch, or Stevens flume; and from increasing the grade thereof; and from using the same, or either thereof, with a greater width, depth, or grade than as the same were wont to be used on and before the 10th day of June, A. D. 1870"—and inserting in place of the portion stricken out the following words, to wit: "and from diverting or using any of said waters in any way or manner whereby such diversion or use will injuriously affect the complainants, or their grantees, in a greater degree than they would be affected by such diversion and use of said waters as prior to the 10th day of June, 1870, was wont to be practiced by those using and enjoying the said Pollard ditch, American ditch, and Stevens flume."

The costs of the writ of error, and in this court, should be paid by defendant in error.

DE FRANCE, C., and STALLOUP, C., CONCUR.

Per Curiam. For the reasons given in the foregoing opinion, the judgment of the court below is reversed, and the cause remanded, with directions that a decree be entered in accordance with the views expressed. The costs of proceedings in this court will be taxed to defendant in error.

Reversed.

1. Right to dump may be lost by adverse possession of the ground claimed for place of deposit. *McLaughlin v. Del Re*, 16 Pac. 881; 71 Cal. 280.

2. Lessee has no right to tailings. *Erwin's App.* 16 M. R. 91.

3. As to pollution and choking of streams from debris see note to *People v. Gold Run Co.*, 56 Amer. R. 89.

4. District rule allowing one claim to flume across another, maintained. *Biborado v. Quang Pang M. Co.*, 6 Pac. 125.

SAWYER V. TURNER ET AL.

(1 Denver Legal News, 68. In the Circuit Court of the United States District of Colorado, 1888.)

Annual labor—Tender to co-tenant. Tender by co-tenant to co-tenant of his proportion of annual labor makes void any further proceedings to forfeit a title.

¹ **Single co-tenant seeking patent in his own name.** Where one of several co-tenants applies for and obtains patent of the United States for mining property held in common, the co-tenant not named in the application may adverse; but if he fail to adverse, the applying co-tenant will take the title as trustee for the benefit of all the owners, and his co-tenant not named in the patent may assert his rights by bill in equity.

S. H. BALLARD, for complainant.

A. D. BULLIS and M. B. CARPENTER, for defendants.

Opinion by HALLETT, J., on demurrer to bill.

Sawyer against Turner and others is a bill to acquire title to an undivided interest in the Wallace lode. The bill shows title in complainant to five-eighths of the Wallace lode, unless it shall appear that the plaintiff's title was divested and acquired by the defendant Turner under certain proceedings in respect to annual work during the year 1884, and by an application made by him for a patent upon which he has made an entry in the land office.

As to the proceeding to acquire title in respect to the doing of annual work in the year 1884, the plaintiff alleges that after the work was done and in the early part of January, 1885, he tendered to the defendant Turner the amount coming from him in payment for that work, and notwithstanding this, the defendant proceeded to make an advertisement and to declare his interest in the lode forfeited. Complainant has also alleged other matters affecting the proceedings in respect to annual work which I have not considered. Of course, if plaintiff tendered the amount coming from him for this work, Turner could not thereafter

¹ *Suessenbach v. Bank*, 41 N. W. 662.

proceed to acquire his interest under the act of Congress, and assuming the bill to be true upon that point, as we must upon demurrer, no further consideration need be given to that matter.

More difficulty arises in respect to the effect of the proceeding by Turner to acquire title to the lode in the land office. It is claimed that under the act of Congress, the notice given by Turner, being such as is usual in cases of that kind, was sufficient to bar the complainant from his title to the lode if he made no adverse claim in the land office and took no steps to defeat Turner in his effort to get the whole title. And that is a matter that is not entirely clear. It seems to me that complainant Sawyer might, by adverse proceedings, have compelled Turner to admit him to apply for his interest in the lode, and to acquire his interest under the patent. But that he was bound to do so in order to protect himself and to secure his interest in the property does not follow from that. The general purpose of the law, I think, is to meet the case where there are two conflicting titles to the same property, and that it is not intended to apply in the first instance, at any rate, to the case in which the applicant may have some relation of trust and confidence with other people, as that he may be acting as the agent of another, or under an agreement to hold the title for another.

The general rule that a tenant in common can not acquire an adverse title to defeat his associate in the ownership of the property is well established. If the government title had been a title outstanding in a third party, nothing is clearer than that Turner would not be at liberty to acquire that title with a view to defeat the title of his co-tenants. There are decisions to that effect, as *Lloyd v. Lynch*, 28 Pa. St. 419; *Downer v. Smith*, 38 Vermont, 464; and the authorities are collected in Freeman's Co-tenancy, Section 166. It seems to me that one who may be in possession of property, holding only a part or an undivided interest, ought to be subject to the same rule in acquiring title from the Government of the United States. What he does in point of fact is to get in a superior title from the Government. He does it under the provisions of the statute, it is true, and he does

it upon notice to all parties interested to appear and contest his right, but the peculiar manner in which the title is obtained does not affect the quality of the act. The circumstances are that he is in possession, and under a general rule of law representing presumably all who are interested in the property, and it can hardly be said that his associates in interest are bound to assume that he is going to take steps hostile to them, and with a view to defeat what claim they may have to the property.

It ought rather to be said that in acquiring title to the premises he is proceeding in a lawful manner and for the benefit of all who may be concerned in the property. I have found no direct authority upon this question, and none was cited by counsel, but it seems to me that it is but just and reasonable to apply the general principle applicable to all cases of ownership, by tenants in common, that whatever is done toward perfecting the title shall be deemed to be for the benefit of all who are concerned in the property.

In that view I am inclined to think that this is a good bill, and that the demurrer ought to be overruled.

1. A license by one tenant to mine will not bind a dissenting tenant. *Tipping v. Robbins*, 25 N. W. 718; 64 Wis. 546; 87 N. W. 427; *contra: Williams v. Morrison*, 28 Fed. 872.

2. Resulting trust on relocation. *Hunt v. Patchin*, 85 Fed. 816.

3. Construction of deed of one-half interest in minerals to be found. *Rowell v. Bodfish*, 10 Atl. 448.

4. Presumed to hold in equal proportions; same rule as to beneficiaries. *Loring v. Palmer*, 118 U. S. 821.

5. Mineral was taken from ground held by tenants in common under license good as to certain of them, void as to others; the title of the mineral removed in such case considered. *Tipping v. Robbins*, 87 N. W. 427.

6. Mining and cutting timber by one co-tenant is not waste. A tenant in common will not be enjoined. Where tenant in common opens a new mine he should be allowed a rebate for expenditures in protecting title. *McCord v. Oakland Q. Co.*, 37 Pac. 868.

7. A co-tenant is not bound to pay his share for improvements on the common property unless he agreed to pay or ratifies their construction. *Welland v. Williams*, 29 Pac. 408.

8. There is no such relation of trust between co-owners, partners only in the working of the mine, as to prevent one from receiving a higher price for his interest than his co-vendor. *Harris v. Lloyd*, 28 Pac. 736.

¹CHEESMAN ET AL. V. HART ET AL.

(43 Federal, 98. In the Circuit Court of the United States; District of Colorado. 1890.)

Meanderings of vein. Where the strike of the vein passes through the end lines of the location, the fact that between the end lines the out-crop is forced by the surface influences of slides and debris to meander so as to make slight variations from the general trend of the strike, does not prevent the side lines from being parallel with the vein; it is only necessary in such case that they should be substantially parallel.

Effect of crossing survey. The fact that a location is cut by another valid claim crossing it obliquely does not make the line of such intersection the end line of the location when the location extends beyond the intersecting claim.

Quitclaim of Overlap. Where part of the end of a location is adjudged to be in conflict with a prior claim, and thereupon the owners of the prior claim quitclaim the land in conflict to the owners of said location, whose possession thereof is not interrupted, the location will continue to include the land in conflict.

²**Presumption in favor of location.** Where mining locations which have passed out of the hands of the original owner have stood unchallenged for years, and have been developed to a considerable extent, it is proper in a suit involving their validity to instruct the jury that "the certificates of location are presumptive evidence of discovery, and every reasonable presumption should be indulged in by the jury in favor of the integrity of the locations."

³**Patent subject to dip of adjoiner.** Under Rev. St. U. S. Sec. 2322, which gives the locators of lode claims the right to follow the dip of the vein beyond their side lines, such right is not cut off by the issue of a patent for the land into which such vein in its dip extends.

Production of papers. Where during the progress of a trial defendant's counsel, on being asked by plaintiff to produce a certain paper, promises to look for it, and bring it into court if found, and the plaintiff's counsel does not again call the matter to the attention of the court, the right to insist on the production of the paper, or introduce secondary evidence of its contents, is waived.

Right to open and close. In trespass for taking ore, where the defendant admits the taking and seeks to justify it, and the only evidence necessary to make out a *prima facie* case for plaintiff is the production of his patent, and proof of the quantity and value of the ore taken, it is proper to allow the defendant to open and close the argument to the jury, the burden of proof on the main issue in the case being on him.

¹ S. C. in equity, *ante* p. 79; on trial at law, 40 Fed. 787.

² *Harris v. Equator Co.* 12 M. R. 178.

³ See *Pacific Co. v. Spargo*, 16 M. R. 75.

Power of judge beyond his district. A district judge who has, under order of the circuit judge, tried a case in another district, has jurisdiction to pass upon a motion for a new trial in the case, even after he has returned to his own district, where the parties waive his returning to the other district for the purpose of deciding the motion.

At law. On motion for new trial.

C. J. HUGHES, for plaintiffs.

B. F. MONTGOMERY, A. S. FROST, and C. C. PARSONS, for defendants.

PHILIPS, J.

I have examined the grounds for new trial herein as fully as my limited time would permit, and can give but a cursory review of the many questions involved. During the progress of the trial, extending over a period of two weeks, with access to the statutes and decisions of the courts in similar mining controversies, aided by the daily discussions of able counsel on both sides, the court learned all it could, and its conclusions on the law are expressed, as fully as seemed justifiable, in the charge to the jury reported in 40 Fed. Rep. 787. Such questions were new to the court, but it labored to understand so much of the facts and the law as would enable it to present the case fairly to the jury. Some of these questions were embarrassing, and are by no means free from doubt. The evidence impressed my mind, by a great preponderance, as tending to establish the existence of an outcrop of a lode of mineral within the surface lines of the Champion claim, and that this vein was, in contemplation of the statute, a continuous one to the point of the alleged trespass.

The question of fact and law which has most perplexed the mind of the court is as to the parallelism of the defendants' claims. The parallelism of the end lines of the surveys and the parallelism of the side lines to the actual strike of the outcrop were left by the evidence in such condition as to render the determination of this fact peculiarly a matter for the jury; and I tried to so frame the charge as to leave

them uninfluenced by any impressions of the court respecting the question of fact.

As to the point so much pressed by plaintiffs' counsel, that the outcrop of the vein ran so zigzag or serpentine as to make it the duty of the court to tell the jury that, as matter of law, it was not parallel to the side lines of defendants' claim, my impression at the trial was, and on further consideration my opinion is, that it was not in the mind of Congress, in framing the section of the statute in question, that, where the strike of the vein passes perpendicularly through the end lines, the mere meanderings of the outcrop between the end lines (caused by the surface influences of slides and *debris* on the mountain sides, as the evidence impressed me was the fact in this case) should absolutely control the question of parallelism; but rather that the spirit and reason of the statute require that the settled and permanent course of the vein on its strike, as nature fixed it, should control; of course such zigzagging being restricted to slight variations from the general direction and trend of the strike. The illustration furnished by the expert witness Boehmer in the scored-out apple quite aptly demonstrated the principle of law and fact. It was with this thought in mind that I employed in the charge the term, "substantially parallel," assigned for error in the motion for new trial. It ought not to be that the court should apply to these locations the most exact mathematical precision.

The law being designed for the encouragement and benefit of miners, should be liberally construed, and should look to substance rather than shadow; and here, as elsewhere, should be administered on lines of obvious common sense. So long as the right of trial by jury stands, the court should be allowed to assume that the jury may understand the purport of words and terms which by their common use have acquired a recognized meaning. The term "substantially" means "really, truly, essentially, competently." In the connection in which it was used in the charge the jury could but understand that the variation from parallelism must be substantial, material, and real; that a very slight variation from a mathematical line was not of substance. I am free to make this confession, that neither at the trial nor after

reference to my minutes did or do I obtain from the evidence a very satisfactory impression either as to the precise shape in which the original survey of the Champion claim, or the relocation of 1882, left it. There was an amended location in 1886. Whether or not the lines were substantially parallel under all the evidence (much of it conflicting), together with the aid of the maps and diagrams before them, I thought was peculiarly a question for the jury. Following the decisions of the Supreme Court of Colorado, the charge told the jury that "such amendments or relocations, when made, had relation back to the time of the original location; and these plaintiffs are in no position in this controversy to question such amendments or relocations." The plaintiffs had the full benefit of what counsel so urgently contends for respecting the end lines intersecting the actual outcrop in the following declaration of law, drawn by himself:

"The court further charges the jury, at the instance of the plaintiffs, that end lines, as designated in the location certificate, are not necessarily in law the end lines, unless they actually cross the actual outcrop of the vein."

This is certainly as much as, if not more than, they could claim, in view of the language of the Federal statute (section 2322):

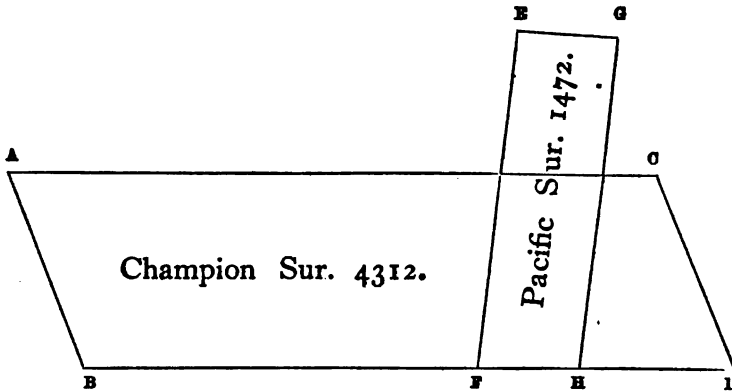
"Their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes, drawn downward * * * through the end lines of their *locations*."

In addition to which the jury were further charged that—

"The statute of the United States also requires that the end lines of the claim should be parallel with each other, and, in asserting a right to follow the vein on its dip without the side lines of their location into plaintiffs' location, defendants must show the outcrop or apex of such vein to be in their own location throughout the ground in controversy, being the extent of the locations of plaintiffs and defendants, parallel to each other."

It was insisted at the trial, and is re-urged forcibly in the motion for a new trial, that the court was in error in holding, as stated in the charge, that "in considering this issue [of

parallelism] you will disregard the fact that the south end of the Champion claim extends beyond or is intercepted by the Pacific survey." The contention of counsel, reduced to its essence, is that, whenever a location as surveyed and certified is intercepted by another valid claim going through it perpendicularly or obliquely, in the following form :



—then the end lines of the location are to be determined by the lines A B and E F. The said statute allows to the locator of any lode claim a length of 1,500 feet along the vein. It has been the custom to obtain this extent by locating over and across an intersecting claim, and in asserting the right of length the intersecting claim of course is excluded.

The construction contended for by plaintiffs would lead to this: that every time there was patented an intersecting slice through a location, although it left to the locator on either side of the patented strip unchallenged ground, the end lines to which are parallel, he must readjust his end lines so as to obtain his parallelogram without any interruption between the end lines; and if, in the meantime, between the original location and the amendment a lateral contiguous location has passed to patent, the contention of counsel is that the extralateral right to pursue the outcropping vein is

gone irrevocably; and that even the doctrine of relation, referring back to the original entry, would not apply to save the right. I do not understand that such has been the recognized custom among miners, nor do I believe it executes the will of the statute. So in respect to the Belle of the East claim. It is true that the evidence shows that after the location of the Widow McCree claim the Belle of the East claimed that the north end of the former conflicted with the prior right of the latter, and so it was adjudged. Thereafter, and prior to the alleged trespass, this controversy was ended by the Belle of the East quitclaiming to the defendants. There was no interruption in the possession of the disputed territory occupied by the Widow McCree claim. Both prior and subsequent to that controversy the evidence tended to show the defendants had held and operated as one claim and system of development the Champion group, including the Widow McCree claim, as originally surveyed. The parallelism of the end lines of the Widow McCree claim was not practically disturbed. It seems to me that it would hew to pieces on the sharp edge of merest technicality defendants' apex rights, which they were prosecuting, by looking only at a fragment of the case instead of its essence in the entirety. But little question can be made that when defendants, as claimants of the Champion group, ask for a patent, it will be granted to cover the extent of the original Widow McCree location.

Severe criticism is made of that portion of the charge respecting the assault made by plaintiffs upon the discovery location on the Champion claim. All that was requested by plaintiffs defining the statutory requirements of location, the necessity of the discovery of mineral in place, was given in the charge. The qualification, if such it may be termed, put to this is found on page 791 of the reported charge. The statute of Colorado (sections 2399, 2401) provides for such location of certificates to the discoverer of a lode, and what shall be done by the locator before filing such location certificate, so that such certificate amounts to and imports something. The evidence on both sides tended to show the long-standing indications of a staked claim, and of shafts sunk or holes dug. The witnesses differed only as to the

precise point of such workings. The claims had stood unchallenged for years, and work of more or less importance had been prosecuted at various points on these claims years before this controversy. If, after all this, the court should not tell the jury that every reasonable presumption should be indulged in favor of the discovery of a lode by the miner, it is difficult to conceive of a state of facts where such intentment should arise. Any other rule, it seems to me, would render such claims practically unmarketable or valueless in the hands of an assignee. The miner goes, digs and delves, and is so satisfied that he makes the survey, stakes off his claim, and then makes his location certificate, which is entered of record. After this he sells to an honest man, and passes out of view or dies. All the subsequent workings go to show the existence of a lode or vein on the claim of more or less importance. Can it be that after the lapse of many years the assignee must lose his claim because of his inability to produce the lost or the dead, and prove affirmatively an actual visible discovery by the original locator of ore in place where he dug? Possibly the charge in this particular would have been more theoretically correct had the court told the jury that it was not necessary that defendants should establish such discovery by witnesses to the physical fact at the time. But the same might be inferred from the certificate of location, the manifestations of workings done, the long tenure of the claim, the development of a vein on the claim by subsequent working, and from all the surrounding circumstances. In view of the actual proofs at the trial in this case, had the jury found for the plaintiffs on the ground of the lack of proof of an original discovery, the court would have felt it to be its solemn duty to accord a new trial. Nor do I think even after "cooling time" that the language employed respecting "witnesses sent to these old openings, with their accumulated *debris*, to obtain evidence by inspection that no vein was in fact found by the original locators," as also what was later on said respecting witnesses in general, was any too strong.

Courts, so long as they are presided over by flesh and blood and mind, however weak or strong, must be expected to feel and think. Language, which is the vehicle of

thought, with its seat in the heart, must reflect some tinge of the conviction of an earnest man; and while a proper judicial temper should be rigidly maintained, the judge on the bench should ever feel he is a minister of justice, and should not allow the truth to fail for lack of courageous action and frank utterance on his part. My observation at this trial satisfies me that an important mining litigation is a model training school for expert testimony; and if there ever is a case where the judge himself, like the witnesses in this case, should have the largest latitude of taking part in the discussion, it should be accorded in such cases, at least so far as it "is profitable for doctrine, for reproof, for correction."

It is again urged, as at the trial, that the court should hold that, after the grant of a patent to the adjacent claimant, the right of the mere certificate holder to pursue his vein beyond his side lines is at an end; in other words, that this statutory right of the apex owner applies only as between certificate locators. Such, I am advised, has not been the holding of Judge HALLETT, whose opinion in mining law is justly entitled to great respect. Nothing short of a sense of the supreme command of the law could induce me to set up in this case a different ruling. Counsel has presented his view of this question with marked clearness and force. Without undertaking to review the authorities or his argument, it must suffice here for me to say that the statute contains no warrant for this position, unless it is to be found between the lines. The language of the Federal statute (section 2322) in explicit terms declares:

"The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

The legislature of Colorado certainly entertains the view

that the extralateral right exists without restriction in the mere holder of a certificate location. Section 2405, Gen. St., declares that:

"The location or location certificate of any lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lie inside of the side lines, extended downward vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim."

This, likewise, has ever been the view of the Department of the Interior, as evidenced by the expressed reservation from the grant in the patent. While of course this is not binding on the courts, as it is a matter of statutory construction, yet it is entitled to respect until otherwise affirmatively adjudicated. It might present a different question, if, after the patentee sunk a shaft from the surface of the underlying vein, and had taken actual possession of it, a subsequent certificate locator of the apex should undertake to oust the patentee. But that is not this case.

As to what is said in the brief of counsel touching the Champion group being regarded as one property, it seems to me to be sufficient to say the language of the charge does not justify the elaborate criticism. The court did not tell the jury that the holding of the several claims as one property, and prosecuting the work on any one as a system of development of the whole, would obviate the necessity of an original location, or cure substantial defects in parallelism. Judge BREWER refused to strike out of the answer averments in this particular, and I gave this matter such office in the charge as it seemed to deserve.

The action of the court on the effort of plaintiffs to get in evidence some map or survey, and affidavits used at some preliminary hearing connected with the equity branch of this case, is assigned for error. According to my recollection of the first matter, plaintiffs offered a survey, or something of the kind, made out by some witness of the defendants but not by defendants themselves. My further recollection is that the court observed that, without the testimony of the party who made this paper as to its correct-

ness, he did not see how defendants could be bound thereby. It is possible that, if it had been shown that defendants had approved and used it, it would have been competent evidence, as being of the character of an admission or circumstantial fact, to go to the jury. But, certainly, in view of all the surveys, maps, and diagrams before the jury from both sides, with all the witnesses before the court for examination and cross-examination, and no subsequent attempt by counsel to contradict any one by offering such survey or paper therefor, the court can not see or believe that any such evidence could possibly have changed the verdict; and in respect to the affidavits or paper claimed by plaintiffs to be in possession of defendants' counsel, the history of what occurred at the trial will satisfy the judgment of counsel himself that the court is not in fault for the non-production of that paper.

Counsel had taken the proper legal steps to bring the paper, whatever it was, into court, by giving notice to opposing counsel to produce it. When defendants' counsel was asked in court to produce this paper, the statement by the latter was that he had looked for it and had not found it, but that he would examine further, and if he had it he would bring it into court without more. There the matter rested. The paper was not brought to court. It was expected by the court that before the case closed, plaintiffs would again bring the matter up for some decisive action. If it had been shown to the court that defendants' counsel withheld the paper, on motion they would have been ordered to produce it, or been proceeded against for contempt, and plaintiffs would have been permitted to show the contents by parol. The matter afterward passed out of the mind of the court, as it seemed out of that of plaintiffs' counsel. Certainly, no error was committed by the court in this matter, as it was not asked to take any affirmative action therein. The plaintiffs had the benefit before the jury of the moral effect of what transpired in court relative to this incident.

Error is assigned on the action of the court in allowing defendants' counsel to open and close the argument to the jury. To properly understand this action of the court, a brief reference to the state of the pleadings is necessary.

Owing to the particular character of the averments of the petition as to jurisdictional facts and the grounds of defendants' claim, a question of law arose at the outset as to whether or not the plaintiffs should not go so far in their proofs as to maintain these allegations. But the court soon became satisfied that the question of jurisdiction had been practically eliminated by the action of Judge BREWER in striking this issue from the answer, and later on a careful reading of the answer satisfied the court that it, in effect, admitted plaintiffs' title to the surface location of the Battle Mountain and Little Chicago claim, and directly admitted the invasion of the side lines of the plaintiffs' claim. Under the issues as they really stood, the only burden the law imposed upon plaintiffs was the mere formal introduction of the patent in evidence, and proof of the quantity and value of the ore taken. As it was not to the interest of defendants to disprove the presence of valuable ore at this point, the evidence on this issue was brief, and merely as to the value. If, forsooth, the plaintiff saw fit to extend this mere formal inquiry over a wider field, it was not demanded by the pleadings or by the court.

It is manifest from the trial, the charge of the court, and this motion for new trial, that the real burden rested, and heavily, on the defendants. They held the laboring oar throughout on all vital issues in question. From them the burden of the real issue never shifted. Under such a peculiar condition of the trial, I felt that common fairness demanded that defendants' counsel should open and close the argument. This view of the real equity of the rule in question I have long entertained. I fought for it while at the bar, and shall endeavor to impartially maintain it, as one founded in justice and equality, while I remain on the bench.

My jurisdiction to pass upon this motion is called in question on the ground that I am not now acting under the order of Judge Brewer, which sent me to Colorado to hold circuit court in aid of the district judge. It was the pending litigation between these parties mainly which induced Judge Brewer to send me to Colorado, partly owing to the fact that Judge Hallett wished to be relieved from sitting

in the cause on account of his relation to some of the parties. The trial of the cause would have been incomplete without a final disposition of the motion for a new trial. The right to try the principal cause carries with it the incident. Had I remained at that court until the coming in of the motion for new trial, four days after the verdict, as I might well have done, no question could possibly arise as to my jurisdiction to pass upon the motion. Equally true must it be that I might have returned to Colorado after the motion was filed, and taken it up and decided it. Counsel for both parties having agreed to waive the necessity or burden of such trip to me, my right to pass upon this motion must be viewed as if I had gone to Colorado, or remained there in the first instance, to hear the motion. Unpleasant as it is to act under even the imputation of assuming authority, I feel constrained to proceed in this matter under an imperative sense of official duty. As the consideration of this motion involves not only a review of the questions of law in the case, but the complicated issues of fact, as well as the official and personal conduct of the trial judge, it at once becomes apparent that there is almost a necessity that he should pass upon this motion, as also the bill of exceptions, if any, to be presented in the case.

Respecting what has been brought into the discussion on this motion touching indications of partiality at the trial, I may be indulged simply to say that both litigants and counsel on either side were entire strangers to me when the trial began, and my acquaintanceship with them was limited to the court-room. If collisions between court and counsel occurred, it was doubtless attributable to mutual misconception. Two temperaments much alike, each impelled by a spirit of self-assertion, now and then produce antagonisms more apparent than real. I am satisfied that counsel did his duty, and did it well, on this trial; and no language could express my sense of regret if I felt there was any occasion for the thought that the scales of justice were unevenly held by the court. The court tried the case as best it could; and, if it erred to plaintiffs' prejudice, it will bring no regret to the court personally to see the wrong righted by an appeal to a higher court, or upon a subsequent trial, should the plaintiff

iffs see fit to resort to either. The remedy being left to plaintiffs either to appeal or bring another action within a year, under the provisions of the Colorado statute, I feel the less hesitancy in following my judgment in *denying the motion for a new trial*.

1. Breaking barrier no trespass, nor is (in instances) flow of water through the hole. *National Cop. Co. v. Minnesota Co.*, 57 Mich. 88; 58 Amer. R. 838.

2. Parties in rightful possession of surface, held in trespass for taking coal. *Ashman v. Wigton*, 12 Atl. 74.

BENNETT V. SHAUGHNESSY.

(22 Pacific Reporter, 156. Supreme Court of Utah, 1889.)

Failure to pay as the work progresses. When a party contracts to drive a tunnel and to receive his pay in agreed installments as the work progresses, on default of payment of any installment he may quit work and sue for the part completed. He is not bound to continue after the default.

Payments in this class of contracts are conditions precedent, it being assumed that the contractor needs each installment to pay his outlays as he goes.

Appeal from District Court, First District.

SHEEKS & RAWLINS, for appellant.

GEORGE SUTHERLAND and J. G. SUTHERLAND, for respondents.

ANDERSON, J.

On the 13th day of October, 1883, plaintiff and the defendant, Michael Shaughnessy and John A. Hunter (since deceased), entered into a contract whereby plaintiff agreed to excavate a tunnel 1,200 feet in length along the vein of certain mining properties of the defendants, and to run cross-cuts across the vein from wall to wall at intervals of 100 feet, and to properly timber and complete the same, according to the specifications, by the 1st day of December, 1885. By the terms of the contract, plaintiff was to be paid \$12 per linear foot for the tunnel and \$6 per foot for the cross-cuts. The contract further provided that "the party of the second part (Shaughnessy and Hunter) hereby agree to receive said tunnel one hundred feet at a time, and pay said first party ten dollars per foot therefor, or one thousand dollars upon the completion of each one hundred feet, and the balance of said contract price (two dollars per foot) shall be paid by said second party at the completion of said tunnel contract, and not till then, and further to

pay five dollars per foot for running said cross-cuts at the time of completing each, and at the same time of paying for one hundred feet of tunnel so completed, and the balance of the contract price of running such cross-cuts, to wit: one dollar per linear foot, at the completion of this contract." Between October 10, 1883, and October 5, 1884, plaintiff, in pursuance of the terms of the contract, constructed and excavated 290 and 2-12 feet of tunnel and 11 feet of cross-cutting. March 25, 1884, plaintiff was paid \$1,000 for the first 100 feet completed by him on the tunnel.

Prior to October 5, 1884, plaintiff, having completed and excavated the second 100 feet of said tunnel and its cross-cuts therein, as provided by the contract, so notified the defendants, and demanded of them repeatedly the payment of the second \$1,000, which sum not being paid, nor any part thereof, plaintiff on said day discontinued and abandoned the prosecution of the work under said contract, and brought this action to recover for the work already done and for certain materials furnished by him while engaged in the work under the contract, and prayed that the same be made a lien on the mining properties, for the improvement of which the tunnel was begun.

After the case was commenced, John A. Hunter, one of the defendants, died, and Mary Hunter, administratrix of his estate, was substituted in his stead, as one of the defendants. The case was tried by the court by consent of parties without a jury, and a judgment was rendered in favor of the plaintiff and made a lien on the property of the defendants, and the defendants now prosecute this appeal.

The only question presented by the appeal for our consideration is whether the plaintiff could rescind and abandon the contract, and recover the amount due for the work already done, upon the failure of the defendants to pay for the second 100 feet of tunnel, upon the completion thereof, and demand for such payment.

Counsel for defendants contend that the failure on their part to make a partial payment at the time stipulated, did not excuse the plaintiff from performing the contract on his

part, nor justify him in abandoning the work thereunder, unless the defendants were insolvent, and unable to pay, or the circumstances were such as to show that they intended to abandon the contract. This position is untenable. The contract contemplated that more than two years would elapse before it would be completed, and that it would involve a large outlay in labor and money.

The evidence was undisputed that plaintiff stopped operations for want of funds to prosecute the work, and the court found that the provision of the contract, that each section of 100 feet was to be paid for when completed, was for the purpose of furnishing the plaintiff with funds to enable him to further prosecute the same, and that plaintiff was compelled to discontinue and abandon the work by reason of his failure to receive such payment.

In construing contracts courts may look at the language employed, the subject-matter, and all the circumstances surrounding the parties at the time of its execution, for the purpose of determining the real intentions of the parties in making it.

What will constitute a condition in a contract will be determined in each case, not only from the language used, but from the subject-matter to which it relates, and the surrounding circumstances as gathered from the whole instrument, and all the evidence in the case.

Where a party enters into a contract requiring a long time and a large expenditure of money and labor in its performance, or for the sale and continuous delivery of goods, stipulating for payments therefor at stated intervals, as the work or delivery of goods progresses, the payment of such sums will ordinarily, in the absence of a contrary intention appearing in the contract or circumstances of the case, be held a condition precedent to the further prosecution of the work or delivery of the goods, and in case of a failure to receive a partial payment as stipulated, the contractor or vendor may rescind the contract and recover for the work already done or for the property delivered. In *Canal Co. v. Gordon*, 6 Wall. 561, the company entered into a contract with Gordon & Kinyon, by which the latter agreed to construct an extension of a canal and complete the work by

July 1, 1853. By the terms of the contract they were to receive monthly payments in a specified way, as the work progressed, and in case of failure of such partial payments the same should draw interest at a specified rate.

On the 7th day of June, 1853, an estimate being taken, it was found they were entitled to about \$20,000 for work done in May. The money not being paid, they demanded payment and notified the company that they should discontinue the work in six days unless other and secure financial arrangements should be made. No reply being made to this demand, the work was discontinued at the end of six days, a lien was filed against the canal, and suit brought to foreclose the lien.

The Circuit Court gave judgment for the amount due at the date of the discontinuance of the work, and the canal company appealed. The Supreme Court of the United States held that the contractors were justified in abandoning the work; that the fault was with the canal company; that the contractors could recover for the work done up to the time of quitting, although it was a number of days after the failure of the company to make payment.

In *Reybold v. Voorhees*, 30 Pa. St. 116, the plaintiffs contracted for a growing crop of peaches, to be delivered from day to day, and to pay for them at the end of each week; and paid to defendant \$500 as security for the faithful performance of the contract on their part. The defendant delivered peaches for one week, as provided by the contract, but plaintiffs failed to pay him therefor. He also delivered peaches on the following Monday, but, plaintiffs still failing to make payment, the defendant rescinded the contract, refused to make any further deliveries to plaintiffs, and disposed of the remainder of his peach crop to other parties. In an action by plaintiffs against defendant for his refusal to make further deliveries of peaches under the contract, it was held that, on a single failure by the purchasers to pay at the end of a week, the seller had the right to rescind the contract, and that an offer on the part of the purchasers a day or two afterward to pay the amount due was too late. See, also, *Construction Co. v. Seymour*, 91 U. S. 649; *Norington v. Wright*, 115 U. S. 188; *Busfield v. Wheeler*, 14

Allen, 139; *Smith v. Norris*, 120 Mass. 63; *Hartje v. Collins*, 46 Pa. St. 268; Bish. Cont. § 1432 *et seq.*

The character of the work to be performed under the contract in this case, the length of time given, and the amount of money required for its completion, as well as the language of the contract itself, show that the object of the provision for payments at stated periods during the prosecution of the work was to enable plaintiff with the money thus obtained to continue the work until completed. The payment of the \$1,000 upon the completion and acceptance of each 100 feet was a condition precedent to the further prosecution of the work by the plaintiff, and the failure of the defendants to pay the \$1,000 due on the completion of the second 100 feet justified plaintiff in abandoning the contract, and, the defendants being in fault, the plaintiff was entitled to recover for the work done.

The judgment of the District Court is affirmed.

ZANE, C. J., and JUDD, J., concur.

1. Ejectment for entire tunnel site allowed. *Glacier Co. v. Willis*, 127 U. S. 471.

2. Defendant cut lode near tunnel: *Held*, a valid location, but liable to be divested. *Hope M. Co. v. Brown*, 19 Pac. 219.

3. Right to tunnel can not be condemned. *Amador Q. Co. v. DeWitt*, 78 Cal. 482.

4. Where a party agrees to pay so much per foot for driving a tunnel it is no defense that the tunnel could have been constructed at a lower cost. *Martin v. Victor M. Co.* 8 Pac. 161; 19 Nev. 181.

5. A tunnel is a mining claim; it may maintain an adverse; its line is protected by the statute. *Back v. S. N. Co.*, 17 Pac. 88.

6. A recorded tunnel will hold blind lodes discovered in its front after its location. *Hope M. Co. v. Brown*, 28 Pac. 732.

HILL v. SUMNER.

(183 United States, 118; 10 S. C. Rep. 42. Supreme Court, 1889.)

Meaning of "dispose" and "sell." When a contract respecting property contains an agreement to be performed by the owner of it when he shall "dispose of or sell it," it is obvious that the words "dispose of" are not synonymous with the word "sell;" and their meaning must be determined by considering the remainder of the contract.

Letting is a disposing of the property. In this case an agreement by the owner of the property which formed the subject of the dispute, that he would not dispose of or sell it, was held to have been violated by a lease of it for a term of two years.

Facts of the case—Construction of the contract. H. was the owner of six-eighths, and S. and his son of one-eighth each, in a mine. H. had means, but his co-owners had none, and he paid the expenses of partly developing the mine himself. S. sold his interest to H. for a fixed sum, of which a part was paid in cash, and the residue was to be credited with the portion of the expenses previously paid for S., as well as expenses thereafter to be incurred in sinking the shaft and operating the mine. Similar expenses paid for the son of S., as well as his share of the taxes and costs of litigation, were to be deducted also. After deducting these sums, the residue of the price was to be paid to S. out of the first products of H.'s interest in the mine; and the contract further provided that, if H. should "dispose of or sell" one-eighth interest in the mine, the residue of the purchase price should become payable at once: *Held*, that the contract contemplated that H. should prosecute the development of the mine until its worthlessness should be proved, or the purchase money exhausted by the expenses; and that if H. put it out of his power to develop the mine, by leasing it for a term of years on a royalty, the residue of the price became due immediately.

T. M. PATTERSON and C. S. THOMAS, for plaintiff in error.

L. C. ROCKWELL, for defendant in error.

MILLER, J.

This is a writ of error to the Circuit Court of the United States for the District of Colorado. The action was originally brought by Mary J. Sumner, the present defendant in error, against David K. Hill, plaintiff in error, in the District Court of Arapahoe County, in the State of Colorado, and was

afterward removed by Hill, on the ground of diverse citizenship, into the Circuit Court of the United States.

It appears from the record that on and prior to the 12th day of February, 1880, the defendant, Hill, and Edward R. Sumner, and his son, Edward H. Sumner, were the owners of a mine, called the "Buckeye lode," situated on Fryer hill, in the California mining district, in the county of Lake and State of Colorado; that the said Edward R. Sumner was the owner of one-eighth, and his son, Edward H. Sumner, the owner of another one-eighth, undivided, of this mine, of which Hill was the owner of the remainder. It also appears that Hill was a man of considerable means, which was not the case with the others. That some work had been done upon the mine, and money expended upon it, which had been advanced mainly by Hill. That in this condition of affairs Edward R. Sumner sold his one-eighth in the mine to Hill, and took from Hill a written obligation to pay him \$10,000 for it, in the manner prescribed by an instrument in writing, of which the following is a copy :

"This is to certify that Edward R. Sumner, of Leadville, state of Colorado, has this day sold to me one undivided one-eighth part of the Buckeye lode, vein, mine, or deposit, situated on Fryer hill, in the California mining district, in the county of Lake, in the State of Colorado, for the sum of ten thousand dollars, to be paid as follows, to wit, (\$1,308.43) one thousand three hundred eight $\frac{4}{100}$ dollars cash in hand, the receipt of which is hereby acknowledged. *Second.* To pay all expenses for and on behalf of Edward R. Sumner upon one undivided one-eighth part of said mine, owned by Edward H. Sumner, which have accrued since the first day of February, A. D. 1880, and which may hereafter accrue for sinking the shaft upon said mine, for all machinery purchased in sinking the shaft, and in operating the same until pay mineral shall have been reached. *Third.* To pay on behalf of said Edward R. Sumner, for the benefit of Edward H. Sumner, owner of said one-eighth interest of the whole of said mine, one eighth part of all the expenses for litigation regarding the title and the possession thereof, or for trespasses which may be committed upon said property from and after the date above written. *Fourth.* And to pay, on

behalf of the said Edward R. Sumner, one-eighth part of all other assessments, taxes and expenses (meaning upon the one-eighth interest owned by Edward H. Sumner, being independent of the one-eighth conveyed to me this day by said Edward R. Sumner), of every name and nature, which may justly accrue against said property; which sum or sums of money, as well as all other sums of money which may be advanced and paid out by me in pursuance of this agreement, shall be applied by indorsement upon this contract by the said Edward R. Sumner, or his assigns, in payment of the aforesaid sum of ten thousand dollars, as far as the same shall go to the payment thereof. *Fifth.* And, after deducting all the aforesaid sums of money above mentioned, I hereby agree to pay to the said Edward R. Sumner, or his order, the residue of the said ten thousand dollars, out of the first production of my interest in said mine, so soon as the same shall be realized therefrom; and if, at any time, I shall dispose of or sell one-eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable to the said Edward R. Sumner, or his order. In no case am I to pay out more than ten thousand dollars on behalf of said Edward R. Sumner on the one-eighth interest of Edward H. Sumner, including the \$1,308.43 mentioned as paid above. Witness my hand and seal this twelfth day of February, A. D. 1880, at Chicago, Illinois. [Signed] DAVID K. HILL. [Seal.]”

It seems, from this paper, pretty clear that Edward R. Sumner, in conveying his one-eighth, was anxious to secure the other one-eighth held by his son, Edward H. Sumner, from being lost by reason of his inability to pay such assessments as might be made on it in the progress of developing the mine, and bringing it into profitable operation. It appears from the record that Hill continued work upon the mine, and received credit upon this written contract, until October 10, 1883; and about that time he ceased to work upon it, or to make any further effort to develop it. On July 29, 1885, Hill made a lease of the mine to George A. Jenks, who had been agent of Hill in the previous efforts to develop it. The following is a copy of this lease:

"This agreement of lease, made this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five, between David K. Hill, of the city of Chicago, county of Cook, and State of Illinois, and Robert Esser, of the city of Leadville, county of Lake, and State of Colorado, lessors, and George A. Jenks, of the city of Leadville, county of Lake, and State of Colorado, lessee, witnesseth: That the said lessors, for and in consideration of the royalties, covenants, and agreements hereinafter reserved, and by the said lessee to be paid, kept, and performed, have granted, demised, and let, and by these presents do grant, demise, and let, unto the said lessee, all the following described mine and mining property, situate in California mining district, county of Lake, and State of Colorado, to wit: All their interest in the 'Buckeye' lode mining claim, situate on the north slope of Fryer hill, in said mining district, county, and State, together with the appurtenances; to have and to hold unto the said lessee for the term of two years from date hereof, expiring at noon on the 29th day of July, A. D. 1887, unless sooner forfeited or determined, through the violation of any covenant hereinafter against the said tenant reserved. And in consideration of such demise the said lessee does covenant and agree with the said lessors as follows, to wit: To enter upon said mine or premises, and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine, and to the special covenants hereinafter reserved. To well and sufficiently timber said mine at all points where proper, in accordance with good mining, and to repair all old timbering wherever it may become necessary. To keep at all times the drifts, shafts, tunnels, and other workings thoroughly drained, and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty. To deliver to said lessors as royalty ten per cent of the net smelter returns of all ore extracted from said premises running to and including twenty dollars (\$20) per ton; and on all ores running over twenty dollars (\$20) per ton, twenty-five per cent of the net smelter returns. To deliver to the said les-

sors the said premises, with the appurtenances and all improvements, in good order and condition, with all drifts, shafts, tunnels, and other passages thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued work (accidents not arising from negligence alone excusing), without demand or further notice, on said 29th day of July, A. D. 1887, at noon, or at any time previous, upon demand for forfeiture. And, finally, that, upon the violation of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of the lessors, expire, and the same, with said premises, with the appurtenances, shall become forfeited to said lessors, and said lessors, or their agent, may thereupon, after demand of possession in writing, enter upon said premises, and dispossess all persons occupying the same, with or without process of law, or, at the option of said lessors, the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful detainer. And the said lessors expressly reserve to themselves the property and right of property in all minerals to be extracted from said premises during the term of this lease. Each and every clause and covenant of this agreement of lease shall extend to the heirs, executors, administrators, and lawful assigns of all parties hereto.

In witness whereof the said parties have hereunto set their hands and seals.

ROBERT ESSER. [Seal.]

DAVID K. HILL. [Seal.]

GEORGE A. JENKS. [Seal.] ”

The obligation of Hill was assigned by Edward R. Sumner to Mary J. Sumner, the present plaintiff in error, who brought this action. Two issues were raised by the pleadings in the case. The first of these was that there was a failure on the part of Hill to prosecute with due diligence his obligation to develop the mine, whereby the sum of \$10,000, less the sums credited on the contract, became due. The second was, that, by making the lease, the complainant had, within the meaning of the fifth clause of the contract, *disposed of* the mining property so as to become immediately liable for the residue of said \$10,000.

The court, by instructing the jury that the execution of this lease by Hill caused the remainder of the \$10,000 to become due and payable, rendered it unnecessary for the jury to consider the first proposition; and, if the court was right in that instruction, the verdict of the jury in favor of the plaintiff necessarily followed. We shall therefore consider the soundness of this instruction.

The definition of the words "dispose of" or "sell," in this article, must be considered with reference to the remainder of the contract, to ascertain its meaning. Obviously, the word "dispose" must have some meaning in the contract, and is not synonymous with the word "sell." It would be useless if such were its construction. It must mean something more or something less than the word "sell." In the circumstances of this case, it would seem to mean something more. The references of counsel in their briefs to decided cases attempting to define that word are, of course, of very little avail, as in each instance it must be taken in connection with the circumstances in which it is used.

In the language of this court in the case of *Phelps v. Harris*, 101 U. S. 380, "the expression 'to dispose of' is very broad, and signifies more than 'to sell.' Selling is but one mode of disposing of property." Looking, then, to the purposes which Edward R. Sumner had in view in the use of this clause, by which the sale or disposal of one-eighth of the property rendered the \$10,000 due, less the credits that should have been entered upon it at that time, it is obvious that it was expected that Hill would continue to make efforts to develop the mine, and put it in profitable working condition, until all parties were ready to abandon it as a useless experiment, or until the \$10,000 which Hill had agreed to pay Edward R. Sumner had been exhausted by payments of contribution on account of the one-eighth interest remaining in Edward H. Sumner. Any contract made by Hill which would put it out of his power to perform this obligation was the thing to be guarded against, and the only guard which the contract provided was that he should not make such disposal of even one-eighth of the property. If he chose to dispose of one-eighth, or of the whole of it, by selling it outright, or by leasing it for

two or five or ten years, he had the right to do it. In such event, however, he became liable to Sumner for so much of the \$10,000 as had not been exhausted by paying the contributions properly assessable against the one-eighth of Edward H. Sumner. This option he exercised by making the lease to Jenks. If the results of that lease have been as profitable as Hill might have supposed it would be, he could well afford to pay the remainder of the \$10,000. If they have not, it was a losing venture, which he voluntarily entered upon. We are of the opinion that in doing this he disposed of the property, within the meaning of the clause under consideration, and instantly became liable for that part of the \$10,000 which he had not paid by advances on account of the interest of Edward H. Sumner. As this view of the case was in accordance with instructions of the presiding judge, and is conclusive of it, the judgment of the Circuit Court is *affirmed*.

1. One of certain parties found to be partners in the sale of a mine bought the mine himself. *Held*, that after the purchase the partnership ceased, but that the bill which sought to declare a trust could be held to compel an accounting of the previous partnership affairs. *Kayser v. Maugham*, 6 Pac. 803; 8 Colo. 282, 839.

2. Fraudulent concealment of ore and extra compensation paid to vendor's agent may set aside a deed. But where these facts are denied, an injunction preliminary will not be granted. *Daniel v. Brown*, 33 Fed. 849.

3. Option to purchase is not necessarily without consideration in a prospecting contract. Proof that mining would destroy value and render purchase money mortgage worthless, not a defense. *Corson v. Mulvany*, 49 Pa. St. 88; 88 A. D. 485.

4. Specific performance of prospecting contract enforced. *Moritz v. Lavelle*, 16 M. R.

5. As to what constitutes fraud and duress—general promise to promote the scheme, accepting reduction under financial press, &c., see *Adams v. Schifer*, 17 Pac. 21; 11 Colo. 15.

6. Cross propositions, no sale. *Bowman v. Patrick*, 36 Fed. 188.

7. In action for purchase money location need not be proved, as it is not in dispute between vendor and purchaser. *Philes v. Hickies*, 18 Pac. 595.

8. Where purchasers enter into possession, find they have been deceived, but neither rescind nor bring action, and continue in possession, they are estopped from setting up misrepresentations as a defense to an action on the contract. *Butler v. Gage*, 23 Pac. 462.

9. Vendor, after long delay, bought the title he had agreed to convey from an adverse holder. *Held*, that the delay excused buyer from accepting lease agreed for. *Kille v. Reading Iron Works*, 21 Atl. 666.

E. MILLER ET AL. V. CHESTER SLATE CO.

(129 Pennsylvania State, 81. In the Supreme Court, 1889.)

"Working the quarry." Where a lease was forfeitable for "not working the quarry" during three successive months, and the pit during such period was flooded, work in removal of the water was "working the quarry" under the covenant. Such work and removing *debris* necessary to win the slate was a working of the pit.

Where a case resolves itself into a single question upon which the jury are left to find as upon a question of fact, and their verdict is the same as the finding of the court should have been upon the same point treated as an issue at law, the result is well, and without error.

Error to the Court of Common Pleas of Northampton. Ejectment by Edwin Miller and others against the Chester Slate Company, holding under a quarry lease which plaintiff claimed to be forfeited.

Judgment for defendant, and plaintiffs bring error.

EDWARD J. FOX and EDWARD J. FOX, JR., for plaintiffs in error.

O. H. MEYERS and GEORGE W. GEISER, for defendant in error.

WILLIAMS, J.

There are twenty-one assignments of error in this case, but they relate, directly or indirectly, to the same subject. The company defendant is the lessee of a slate quarry. The plaintiffs are the lessors. The lease contains the following stipulation: "The party of the second part agrees to forfeit the lease when they fail in not working the quarry for a space of three successive months."

The plaintiffs allege a forfeiture by reason of a failure to work the quarry during three successive months from the 18th October, 1886, and have brought this action to recover possession for that reason.

The defendant denies that there has been a failure to work

the quarry for three months, and asserts that, for several weeks of the time counted by the plaintiffs, operations were practically impossible by reason of the accumulation of snow and ice in and upon the sides of the quarry; that for three or four other weeks the quarry was filled with water by heavy floods to such an extent that it was necessary to keep the pumps constantly in motion, in order to make it possible to reach and quarry the slate. This work the defendant says was done in the quarry, and was necessary to be done before quarrying slate could be resumed. Two questions are thus raised: *First*. What do the words "working the quarry" mean? *Second*. Who shall determine the question, the court or the jury? The quarry is the excavation or pit from which the slate is taken. Working the quarry, therefore, is the working of the pit. The doing of any work necessary to the proper and convenient use of the pit, such as the removal of earth, *debris*, water, ice, or snow, would seem to be working the quarry as truly and as usefully as the blasting and removal of the slate-rock, for the latter can not be done unless the quarry is kept reasonably free from obstruction.

A coal mine is worked for the purpose of obtaining coal; but gangways are to be made, slate removed, and drainage secured, before mining can be successfully done. If a mine should be flooded with water, the removal of the water is a necessary mining operation, and until it is accomplished the miners cannot resume work on the coal. While this work is in progress, with the pumps moving day and night, the operator is doing the necessary—the only possible—work in his mines, and is working them, as matter of fact and law. We think the meaning of the words is plain and obvious without the aid of the testimony of experienced quarrymen, and that they were rightly interpreted by the jury. If so, the second question is unimportant in this case. If the meaning be that which has been indicated, the plaintiffs were no worse off because the jury were left to say so upon the evidence than if the court had so instructed them as matter of law.

What the plaintiffs asked was that the court should interpret the contract to mean that a failure to hoist slate-rock

from the quarry was a failure to work the quarry. No matter what else was being done, nor how indispensably necessary it might be to the work of getting the slate, it must go for nothing. This would be both narrow and unjust, and the court was right in refusing to put such a construction on the words under consideration. Whether the correct exposition came from the court or the jury could make no possible difference to the plaintiffs, for its effect upon the verdict in either case would be the same. The assignments of error are not sustained, and *the judgment of the court below is affirmed.*

1. The lessee of coal mines sunk a shaft which he used to get coal from other mines by instroke, doing only enough work on the demised ground to fill the legal covenants of his lease: *Held*, a proper case for the relief of the lessor in equity. *Peters v. Phillips*, 19 N. W. 662.

2. Under an information against a defendant for neglecting statutory regulations securing the safety of the mine, it is not a fatal objection that one alone is charged, though apparent from the information that others should be joined with him. *Reg. v. Brown*, 7 El. & Bl. 757.

INDEX-DIGEST.

THE BOLD FACE FIGURES REFER TO THE VOLUME; THE ROMAN FIGURES
TO THE PAGE.

ABANDONMENT.

1. *Independent of the statute of limitations.*—Abandonment may consist of a single act or a series of acts. It determines the right of the party, so that the property becomes to him "as though he had never owned or occupied it." And it is independent of the statute of limitations. *Davis v. Butler*, 1, 7
2. *Abandonment and gift distinguished and defined.* *Richardson v. McNulty*, 1, 11
3. *Meaning of term abandonment.*—"Abandonment" has acquired a technical meaning; there can be no reason why it should receive a special signification when applied to a mining claim. *Mallett v. Uncle Sam Co.*, 1, 17
4. *Abandonment defined—How affected by statute.*—The word abandon, means to intentionally desert or forsake. Intent may be inferred from acts and declarations of the party to be charged. In addition to actual abandonment, the statute requires it to be followed by non-user for one year, before the original owner is deemed to have lost all title therein. *Dodge v. Marden*, 1, 68
5. *Abandonment divests title*, as does gift or sale. *Derry v. Ross*, 1, 1
6. *Abandonment a legal issue.* *Id.*
7. *Option to abandon.*—Instrument construed to allow a privilege of surrender or retention at the end of a year. *McBee v. Loftis*, 3, 222
8. *Questions of abandonment and prior location* are peculiarly appropriate to the jury, whose action, where they have been fairly submitted, will not be reviewed. *Johnston v. Parks*, 4, 316
9. *Case distinguished from abandonment.*—The case distinguished from one in which the water once diverted is abandoned. *Butte Canal Co. v. Vaughn*, 4, 552
10. *The abandonment of an oil lease* is a question of intention to be found by the jury. *Karns v. Tanner*, 5, 289
11. *Instructions.*—Upon the subject of abandonment, see *Waring v. Crow*, 5, 204
12. *Abandonment by lessee must be pleaded.* *McDowell v. Hendrix*, 9, 96
13. *Intention, how proved.*—Abandonment is a question of intention. The intention is to be found from all the facts and circumstances of the case. *Myers v. Spooner*, 9, 519
14. *Abandonment after action brought—Findings.*—In an action to quiet title to a mining claim, if a supplemental answer sets up an abandonment of the claim by plaintiffs since suit commenced, but fails to

ABANDONMENT. *Continued.*

allege any subsequently acquired rights in defendant, such matters, if true, will not avail as a defense; and the failure of the court to make a special finding of fact thereon is immaterial. *Pralus v. Pacific Co.*, 12, 478

15. *Abandonment a question for the jury.* *Taylor v. Middleton*, 15, 284

16. *Presumption of fact from fact.*—A jury can not rightfully be authorized to find the fact of abandonment from the existence of other nonconclusive, but significant facts. *Stone v. Geyser Co.*, 1, 59

17. *New trial.*—The plaintiff in ejectment for a mining claim obtained a verdict, although the evidence clearly established that he had abandoned the claim. *Held*, that the verdict should have been set aside. *Seymour v. Wood*, 1, 63

18. *Lapse by abandonment.*—Where a lease or a permanent easement in the lands has been virtually surrendered or allowed to lapse for over forty years and the work on the premises kept up only by persons holding adversely to the alleged right, it is an absolute abandonment, and an accounting or other relief is not to be considered. *Hodgson v. Perkins*, 16, 116

19. *Desertion equivalent to abandonment.* *Derry v. Ross*, 1, 1

20. *Slag.*—Abandoned when cast away as worthless. *McGoon v. Ankeny*, 1, 9

21. *Intent negatived where tools are left by locators driven away by Indians, and the locators still regard themselves as owners.* *Morenhaut v. Wilson*, 1, 53

22. *Intention—Law and fact.*—Abandonment is a mixed question of law and fact. If, in fact, a person quit paying assessments in pursuance of an intention to give up his claim, it is an abandonment in fact. *Oreamuno Co. v. Uncle Sam Co.*, 1, 32

23. *Is question of intent and operates instant.* *Derry v. Ross*, 1, 1; *Mallett v. Uncle Sam Co.*, 1, 17

24. *Intention to return overthrows allegation of abandonment.* *Bell v. Bed Rock Co.*, 1, 45

25. *Abandonment of contract, when presumed.* *Grove v. Donaldson*, 2, 507

26. *District rules.*—The failure to perform the work required by the local mining laws amounts to an abandonment of the claim. *Depuy v. Williams*, 5, 251

27. *Tailings.*—To suffer the tailings to flow where they list without attempt to properly confine them, is conclusive evidence of abandonment, unless there is some peculiarity in the locality making an artificial obstruction to properly confine them unnecessary. *Jones v. Jackson*, 14, 73

28. *Belief of relocater that the ground is abandoned is not evidence of abandonment, nor is the general belief in the neighborhood.* *Stone v. Geyser Co.*, 1, 59; *Phoenix Mill v. Lawrence*, 12, 263

29. *Lapse of time not essential.*—The moment the intention is acted on, abandonment is complete. But lapse of time may be a strong circumstance in connection with other circumstances, to prove the inten-

ABANDONMENT. *Continued.*

tion to abandon. Bare lapse of time short of the statute of limitations, is no proof of abandonment. *Mallett v. Uncle Sam Co.*, 1, 17

80. *Animus revertendi*.—There can not be abandonment except where there has been previous possession, and then the *animus revertendi* is the simple test. *Stone v. Geyser Co.*, 1, 59

81. *Non-user not abandonment*.—Water rights can not be divested by *non-user* alone short of the period of the statute of limitations relating to real property. *Dodge v. Marden*, 1, 63

82. *Abandonment of water rights* not implied in sale of mining claims whereon the water is used, to a stranger. *Id.*

83. *Abandonment or forfeiture by tenant in common*.—The possession of one tenant in common is the possession of all, even of one who refuses to pay assessments. In order to enforce the forfeiture of his interest some appropriate suit must be undertaken to liquidate the demand and sell his interest, or there must be clear and unequivocal proof of abandonment. *Waring v. Crow*, 5, 205

84. *Leaving tools upon the ground* considered as evidence against abandonment. *Harkness v. Burton*, 9, 318; *Morenhaut v. Wilson*, 1, 58

85. *Facts not amounting to mutual abandonment*.—Lessees ceased operations in 1873, to the knowledge of lessors, and no royalty was paid or demanded until 1876, when the first period of three years had elapsed. *Held*, that the jury could not presume from this that the contract was ended by the mutual consent of the parties. *Kemble Coal Co. v. Scott*, 9, 80

86. *Effect of lapse of time*—Chattels of one man left upon the premises of another for any length of time, by sufferance, without claim by the owner of the soil, do not, through lapse of time, or even if abandoned by the owner, necessarily revert to the owner of the freehold. *Noble v. Sylvester*, 12, 62

87. *The inference of abandonment of a right from non-user* not applicable to the case of mines. *Seaman v. Vaudrey*, 13, 62

88. *Working one year out of several*.—Defendant, a prior appropriator of water, made no use of it in the years 1878, '79, '80, '82 or '83, but did use it in the intervening year 1881; and during some of those years there was not water enough to work. *Held*, abandonment not proven. *McCauley v. McKeig*, 16, 1

89. *Bringing suit to recover is evidence of intent not to abandon*. *Richardson v. McNulty*, 1, 11

40. *Abandonment may be proved under general issue*. *Bell v. Bed Rock Co.*, 1, 45; *Bell v. Brown*, 5, 240

41. *Range of testimony*.—Latitude should be allowed in cases of abandonment, analogous to the rule in cases of fraud. *Bell v. Bed Rock Co.*, 1, 45

42. *Offer by the re-locating party* to purchase the title alleged to have been abandoned. *Id.*

43. *Evidence to show abandonment*.—Water was appropriated for a particular purpose, which had been fully accomplished, and the parties concerned in the appropriation had dispersed to other parts and had given no attention to the ditch for the period of two years, except

ABANDONMENT. *Continued.*

only to sell it for a nominal sum. *Held*, competent evidence to show abandonment. *Davis v. Gale*, 4, 604

44. *Collusion*.—Where upon a question of abandonment, the plaintiffs offered to show that defendants went into possession of the mining ground by collusion with one of the plaintiffs. *Held*, that the evidence upon such naked offer was well excluded; *aliter* if offered with evidence showing the agreement of such plaintiff with his fellows to hold the claim for them, or on their account. *Depuy v. Williams*, 5, 251

45. *Abandonment of tailings and water allowed to flow from a flume*. *Dougherty v. Creary*, 1, 85

46. *Sale of abandoned water right* by one who has abandoned it will not revive his original right. *Davis v. Gale*, 4, 604

47. *Recapture of abandoned water*.—The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another. *Barkley v. Tieleke*, 4, 666

48. *A lessee may abandon*. *Barker v. Dale*, 8, 597

49. *Abandonment by licensee*.—Where a mining license is granted if the licensee does in fact quit the enterprise, because the ore is comparatively valueless, he will be held to have abandoned the mine, though he gave no formal notice as provided for in the papers, for his conduct is the best of notice. *East Jersey Co. v. Wright*, 9, 832

ACCESSION.

1. *Personal property after annexation to another's freehold becomes part of the realty, and can not be reclaimed*. *Jackson v. Walton*, 14, 488

ACCIDENT.

1. *Mine owner's liability under Illinois Statute—Fright without real danger*. *Wesley v. Healer*, 1, 68

2. *Act of God*.—A guaranty that the principal shall perform a work requiring skill, includes the accidents pertaining to the business, and the guarantor will be excusable only from those inevitable occurrences designated as the acts of God. *Janes v. Scott*, 7, 181

3. *Accident shortly after act took effect, and before the company had time to comply with its provisions*: *Held*, that that fact is no defense. *Bartlett Coal Co. v. Roach*, 10, 682

4. *Statutory regulation for the protection of miners—Fall of coal—Immaterial variance*. *Litchfield Co. v. Taylor*, 10, 684

See MASTER AND SERVANT; NEGLIGENCE.

ACCOUNT.

1. *Account stated—Evidence*.—An account stated is in the nature of a new promise or undertaking, and in this case was properly admitted as written evidence of a contract or obligation on the part of the defendant to pay in gold coin of the United States. *Carey v. Philadelphia Co.*, 1, 349

2. *Parties to account*.—Where all the stockholders have not been made parties, and there is no objection on that ground, an account will be decreed. *Neall v. Hill*, 1, 80

3. *Account essential in action between partners, and its absence, reason for new trial*. *Russell v. Ford*, 1, 75

ACCOUNT. *Continued.*

4. *Excluded stockholder, against fraudulent associates, is entitled to an account and to a decree affirming his interest.* *Smith v. Fagan*,
1, 87
5. *Account against mortgagee in possession for dividends on stock.*
Chapman v. Porter, 1, 102
6. *Plaintiff out of possession.*—An account of the profits can not be decreed in his favor. He must bring his ejectment. *Sayer v. Pierce*,
1, 72; *Logan v. Green*, 10, 822
7. *Account allowed as incident to injunction.* *Ackerman v. Hartley*,
1, 74; *Thomas v. Oakley*, 7, 255
8. *Fraud.*—Account opened and general account decreed against an agent who was also tenant to his principal, for fraud both in allowing the use of certain levels in the mines of which he was agent to be used in working adjoining mines without accounting to his principal, and also for fraudulent misrepresentations in obtaining the lease and concerning the product of the mine. *Beaumont v. Boulton*, 1, 263
9. *Steward taking a mining lease must account as a confidential agent.* *Id.* 1, 263
10. *Account of coal abstracted by underground workings restricted to period within limitation act—Burden of proof lies on wrongdoer.*
Dean v. Thwaite, 1, 77
11. *Charging losses against the mortgagor during a losing year is evidence to establish the investment as made in trust for his benefit.*
Chapman v. Porter, 1, 102
12. *Claims of the agent which by reason of the agent's conduct (or non-authority) can not be ascertained will be disallowed.* *Beaumont v. Boulton*, 1, 278
13. *Interest.*—Interest not carried further than the time the bill was filed, on the ground of acquiescence. *Id.*
14. *Damages for delay in collecting assessments upon stock belonging to the defendants themselves, officers of a corporation, is an item for reparation upon an accounting.* *Neall v. Hill*, 1, 80
15. *Fraudulent concealment of the trespass would alone induce the allowance of an accounting beyond the period of the statute of limitations.* *Dean v. Thwaite*, 1, 77
16. *Timber on hand at dissolution of partnership.* *Massey v. Davies*, 1, 247
17. *Acquiescence in accounts rendered held to bind party to extra interest charged in statements.* *Marye v. Strouse*, 2, 204
18. *Account of ore dug—Possession necessary to secure decree in a proper case from court of equity.* *Bracken v. Preston*, 7, 263
19. *"Errors excepted."*—The exception must be understood, even where not expressed. *Perry v. Attwood*, 8, 441
20. *Venue.*—A bill for an account of the produce of an oil well must be filed in the county where the well is situate. *Thompson v. Noble*,
11, 137
21. *Services of expert accountant, in a suit for an accounting, being necessary and of use to all parties, are therefore a common charge on them.* *Godfrey v. White*, 11, 562

ACCOUNT. *Continued.*

22. *Accounting, as an incident.*—When a proceeding for partition of realty is had in a court of equity, the court will not only proceed to divide the land, but will, in a proper case, direct an accounting, and do equity in the case by making parties account for rents, etc. *Dall v. Confidence M. Co.*, 11, 214

23. *Accounting between tenants in common.*—The fraudulent procuring of an injunction is not a matter which can be considered. *Hall v. Fisher*, 12, 88

24. *Proceeds applied, treated as payments.*—Where a party entitled to but a half interest in the mine puts back into the mine the entire proceeds, it is the equivalent of his partner paying his half of the expenses. *Sears v. Collins*, 12, 400

25. *Rental value treated as proper measure of damages on suit for account.* *Allen v. Barkley*, 14, 246; and again, to same effect, *Early v. Friend*, 14, 271

26. *Action of account at law.*—The statute providing that whenever a suit shall be instituted against two or more defendants to compel them to an account, it shall be by bill in equity, has reference to where defendants are sued to answer severally. *Barnum v. Landon*, 14, 250

27. *Declaration need not charge taking excess.*—A declaration charging the defendants as joint bailiffs of the plaintiffs of iron ore taken from a bed occupied by both parties as tenants in common need not aver that excess of defendants' share was taken. *Id.*

28. *Liability of lessees.*—Whether the lessor or the lessee of a fractional interest is the party to be held to an account depends upon the question as to which of them was in possession receiving the rents and profits; the payment of rent by the lessee to the lessor of the fractional interest, is no defense to the action for an accounting. *Id.*

29. *Mortgagee not a necessary party* unless he has completed his foreclosure so far as to obtain possession. *Id.*

30. *Gold dust treated as money—Interest.*—Clean gold taken from washings may be treated as money, and interest allowed on it where wrongfully kept by co-tenant. *Huff v. McDonald*, 14, 263

31. *Action between tenants in common for account.*—One tenant in common may maintain a suit in equity against his co-tenant who has occupied the whole of the common property for an account of rents and profits. *Early v. Friend*, 14, 271

32. *Act enlarging equity jurisdiction, unconstitutional*, because depriving suitors of right of trial by jury. *North Penna. Coal Co. v. Snowden*, 14, 294

33. *Accounting between co-tenants of mines.*—Actual expenses to be ascertained and allowed. *Graham v. Pierce*, 14, 306

34. *Allowance for improvements* to be accorded the operating tenant making them. *Id.*

35. *Practice as to further accounting* stated where a remnant of the business remains undisposed of. *Id.*

36. *No account in favor of ousted co-tenant till title settled.* *Frisbee's Appeal*, 14, 344

37. *Account against trustee renouncing trust.*—Account decreed

ACCOUNT. *Continued.*

against a trustee who, having engaged the trust property in an adventure, afterward declared it to be on his own account, though no part of the trust money had been actually laid out. *Wilkinson v. Stafford*, 14, 522

88. *Slave injured in mine.* *Barksdale v. Finney*, 14, 541

39. *Demand—Periods of accounting.*—Account will not ordinarily lie until after demand, and then only at reasonable periods. An annual accounting is usual and reasonable. *Barnum v. Landon*, 14, 250

ACKNOWLEDGMENT.

1. *Statutory form of.*—A compliance in substance with the form given in the statute is sufficient. *Johnson v. Badger Co.*, 3, 886

2. *Knowledge of parties* of the existence of the deed or mortgage prevents their advantaging by defective acknowledgment. *Id.*

3. *Corporate acknowledgment.*—Clerical misprision in, disregarded. *Id.*

4. *Form of.*—The persons who acknowledged the execution of a grant were by the commissioner certified "to be the persons who executed the" deed: *Held*, that the certificate was a substantial compliance with the act. *West Point Co. v. Reymert*, 7, 528

See CONVEYANCE, N.

ACT OF GOD.

1. *Extraordinary storms* are the act of God, but a defendant is liable where his agency submitted plaintiff to harm by them. *Turner v. Tuolumne Co.*, 1, 107

2. *The law of self-preservation.*—A may not destroy the property of B to save his own property. *Id.*

3. *Coal contract impliedly based on transportation facilities.*—Delivery prevented by flood allowed as legal excuse. *Lovering v. Buck Mt. Co.*, 12, 535

See ACCIDENT.

ADMISSIONS.

1. *Admissions of stockholders* as to their own acts, not under corporation's authority, are not to be considered evidence against it. *Shay v. Tuolumne Co.*, 5, 587

2. *Verbal admissions of a party* are to be received with caution. *Bragg v. Geddes*, 5, 824

3. *Admissions by agent incompetent to bind—Admissions, how proved.* *Alexander v. Cauldwell*, 5, 650

4. *Admissions of conspirators.*—The acts and declarations of one of several parties acting in concert in an illegal transaction for their joint benefit, are the acts and declarations of all. *Burns v. McCabe*, 7, 1

5. *Admissions by corporate officer.*—Evidence of declarations of the president of the company that the cost of repair would not exceed \$500 was admissible to show that the parties did not intend repairs which would cost several thousand dollars. *Ardesco Oil Co. v. Richardson*, 11, 181

6. *Presence of officer and his expression of satisfaction* while the repairs were going on, was admissible in evidence. *Id.*

ADMISSIONS. *Continued.*

7. *Admissions of agent.*—In a suit against copartners for wages the declaration of a party in the employ of the defendants as to the intention of one of the defendants to pay in a few days is not competent evidence unless his agency for that purpose is first established. *LeFevre v. Castagnio*, 11, 579
8. *Admissions of president acting as viewer.* *Green v. Ophir Co.*, 12, 140
9. *The exclusion of an admission* not shown affirmatively to have been relevant will not be considered error. *English v. Johnson*, 12, 208
10. *A defendant's admission of a fact is not conclusive* upon him, but it is to be weighed by the jury with all other evidence. *Murley v. Ennis*, 12, 360
11. *The admissions of a locator against his title* made after he has conveyed it away are not evidence to impeach it. *McGinnis v. Egbert*, 15, 329
12. *Denial in the present tense construed as admission as to the past under Montana Code* in case of an answer filed six months after the complaint. *Leggatt v. Stewart*, 15, 358
13. *Testimony given by a party or his agent* against his interest is the equivalent of his admissions. *Durham v. Carbon Coal Co.*, 15, 380

ADVERSE CLAIM.

1. *Jurisdiction.*—The person in possession will not be entitled to a decree which will prohibit a third person from obtaining title by purchase from the government. The respective claims should be asserted in the appropriate tribunals. *Brandt v. Wheaton*, 1, 145
2. *Jurisdiction of State Courts* not increased by acts of Congress. *420 Mining Co. v. Bullion Co.*, 1, 114
3. *Jurisdiction of U. S. Courts.*—An action brought in support of an adverse claim is removable into the Federal court. *Frank Co. v. Larimer Co.*, 1, 150
4. *Better title must prevail.*—Possession makes a *prima facie* case only. *Golden Fleece Co. v. Cable Co.*, 1, 120
5. *Possession—Pleading—Burden of proof as to mineral character of land.* *Shafer v. Constans*, 1, 147
6. *Mill-site against placer.*—An adverse claim may be filed and maintained by the claimant of a mill-site against an application for patent on a mining claim. *Id.*
7. *Statute of limitations* of Nevada constitutes a part of the local laws to determine the right between an applicant for patent and an adverse claimant, *420 Mining Co. v. Bullion Mining Co.*, 11, 603
8. *Acts of possession subsequent to filing adverse claim* can not determine claim for which U. S. patent is applied for. *Moxon v. Wilkinson*, 12, 602
9. *Effect of notice required by the statute* to be given by the register of the land office, as well as by the claimant, is in effect a summons to all adverse claimants. *Wolfley v. Lebanon Co.*, 13, 283
10. *The adverse claimant may recover the vein adversely, although a separate vein*, so far as found within the lines of his older and better location. *Freeland v. Hoffmann*, 13, 289

ADVERSE CLAIM. *Continued.*

11. *The burden of proof is upon the adverse claimant. Id.*
12. *Only parties who have filed adverse claims can sue or intervene in a contest instituted to try the right of possession to a mining claim upon which application for patent is pending. Mont Blanc M. Co. v. Debour,* 15, 286
13. *No necessity to adverse later applications. Steel v. Gold Lead M. Co.,* 15, 292
14. *A complaint is sufficient which alleges plaintiff to be owner and possessor of certain land, and that the defendant claims an estate or interest therein, but has none. Rough v. Simmons,* 15, 298
15. *An action to determine an adverse claim to a placer, and to recover a designated portion thereof, is not sustained by proof of a mere easement in the plaintiff over the premises. Rockwell v. Graham,* 15, 299
16. *An easement protected by Federal statute such as a right of way for a flume to conduct water is not ground for an adverse claim to the land. Id.*
17. *Suit dismissed and reinstated—Effect of receiver's receipt obtained in the interim. McEvoy v. Hyman,* 15, 300
18. *Parties to adverse claim suit must prove location under the district rules, or other law in force; under the special statute in such cases occupation alone is not sufficient. Becker v. Pugh,* 15, 304
19. *An action in the nature of ejectment but with modified rules, may support an adverse filed in the land office. Id.*
20. *Possession of premises, by a tenant of plaintiff in suit supporting adverse claim, does not defeat his right to recover. He can not be non-suited on the ground of no possession proved. Wolverton v. Nichols,* 15, 309
21. *A party who has covenanted to convey, but has not yet executed his deed, may support an adverse claim, and is bound to do so to enable him to keep his covenant in good faith. Id.*
22. *Facts of the case.—B was non-suited on the ground that he was not in possession: Held, that such ruling was error. That there being privity between the adverse claimant and the person in possession, the technical want of possession in plaintiff did not defeat his right to have the title adjudicated by a verdict of the jury upon the conflicting claims. Id.*
23. *Publication of notice—Effect of failure to adverse. Hamilton v. Southern Nevada Co.,* 15, 315
24. *The interest or title obtained by a purchaser at a constable's sale prior to the expiration of the publication of the notice is an adverse claim which, unless filed as the statute provides, is waived. Id.*
25. *Application for patent, a proceeding in rem. Id.*
26. *Only citizens of the United States and persons who have declared their intentions to become such, can acquire rights by location. Rosenthal v. Ives,* 15, 324
27. *Verdict in a suit supporting an adverse claim should find affirmatively, whether plaintiff or defendant win. McGinnis v. Egbert,* 15, 329

ADVERSE CLAIM. *Continued.*

28. *The allegation in the complaint that the action is in support of an adverse claim determines the character of the action as one to test plaintiff's right to recover as the holder of a valid location of a mining claim, and to test the defendant's right to go to patent. Allegations in the answer, therefore, traversing the allegation that any adverse claim was filed on behalf of a certain mining claim, make a material issue.* *Marshall Co. v. Kirtley*, 16, 6

29. *Suit by vendee of adverse claimant allowed.* *Id.*

80. *Suit not brought within thirty days.* *Id.*; *Steves v. Carson*, 16, 13

81. *When suit has been brought but dismissed, another action can not, after the statutory period, be brought and maintained under the Colorado statute.* *Steves v. Carson*, 16, 13

82. *In an action supporting an adverse claim, each party is an actor, and must state and prove not only his case against his adversary, but facts showing him entitled to a patent from the United States.* *Anthony v. Jillson*, 16, 26; *Rosenthal v. Ives*, 15, 324; *Thomas v. Chisholm*, 16, 123

83. *Object of the act to settle conflicts.* *Lee v. Stahl*, 16, 152

84. *Original patent not bound to adverse a later application over the same ground.* *Iron Co. v. Campbell*, 16, 218

ADVERSE POSSESSION.

1. *Claim of right distinguished from color of title.* *Colvin v. McCune*, 1, 223

2. *Adverse possession by co-tenants.* *Colman v. Clements*, 5, 247

8. *Adverse possession generates new title.* *420 M. Co. v. Bullion Co.*, 11, 609

4. *Court, not jury, to determine what possession gives title—Use of coal by family.* *Armstrong v. Caldwell*, 13, 253

5. *Possession a question of law.—It is for the court to say what kind of possession is necessary to give title by statute.* *Id.*

6. *Burden of proof on the adverse occupant.* *Id.*

7. *Burden of proving right to water by adverse use.* *American Co. v. Bradford*, 15, 190

8. *Mineral lands may be seated by the owner or one who has color of title, if he derives a profit from them, by using them in the only way in which they can be used.* *Jackson v. Stoetzel*, 1, 228

9. *Seating by trespasser—Tax sale.—To enable a trespasser to seat a tract by enjoyment of profits, a permanent use of the land is necessary.* *Id.*

10. *What constitutes adverse possession of mineral titles.—Acts of ownership, such as constitute possession and confer title under the statute of limitations, must have reference to the mines, as such.* *Caldwell v. Copeland*, 1, 189

11. *Facts amounting to adverse possession.—The quarrying of rock, burning lime, and cutting wood for a lime kiln, building sheds, etc., continued during seven years, amount to an adverse possession under the statute of limitations.* *Moore v. Thompson*, 1, 231

12. *Also, the leasing of quarries and timber by the owner of adjoin-*

ADVERSE POSSESSION. *Continued.*

ing land, and using stone and timber from time to time during the statutory period, accompanied by the payment of taxes, all done under color of title and claim of right. *Colvin v. McCune*, 1, 223

13. *A tax deed, though void on its face, may amount to color of title. Id.*

14. *Squatter on patented mill-site. National Co. v. Powers*, 1, 234

15. *Adverse possession with and without color of title.*—To constitute an adverse possession where there is no paper title, there must be a *pedis possessio*—an actual occupancy—a substantial inclosure; but an actual occupancy of part only will constitute an adverse possession of a whole lot, if color of title is shown to the lot. *Jackson v. Olitz*, 5, 203

16. *Adverse possession under color of decree without deed—Temporary occupancy, no disseizen. Anderson v. Harvey*, 7, 291

17. *Adverse possession may be secured by mining*, if the owner of a mine is not in actual possession. *Armstrong v. Caldwell*, 13, 253

18. *Adverse user of water gives title. American Co. v. Bradford*, 15, 190

19. *After severance surface user is not adverse. Arnold v. Stevens*, 1, 176; *Caldwell v. Copeland*, 1, 189; *Hodgkinson v. Fletcher*, 1, 173; *Rich v. Johnson*, 1, 173

20. *Taking temporary supplies of coal. Jackson v. Stoetzel*, 1, 228

21. *No presumption of grant from adverse use of water.*—In order to raise a presumption of a grant from the adverse use of water, such use must have been peaceable and with the acquiescence of the owner of the servient tenement. *Union M. Co. v. Dangberg*, 8, 113

22. *Non-user of a mine reserved in a deed of land will not, of itself, extinguish ownership.* The surface owner, to effect an adverse possession, must do some act hostile to the rights of the mine owner. *Marvin v. Brewster Iron M. Co.*, 13, 40

23. *No adverse possession by secret mining. Hamilton v. Southern Nevada Mining Co.*, 15, 315

24. *Possession that will ripen into title must amount to notice of claim of ownership. Moore v. Thompson*, 1, 221

25. *Adverse possession as notice.*—Actual adverse possession is notice to one who purchases from one whose sole title is possession. *Partridge v. McKinney*, 1, 135

26. *Idem.*—Where possession is notice and the possession ceases, the notice ceases with it. *Id.*

27. *Ouster by co-tenant retaining profits exclusively. Susquehanna Co. v. Quick*, 1, 203

28. *Prescription—Ditch property.*—Five years continuous possession of a ditch, open, notorious and exclusive, and known to the adverse party, gives title by prescription. *Campbell v. West*, 1, 218

29. *Notorious, peaceful, adverse possession of seven or more years after severance of the mineral title*, where the party has gone into possession under deed, will give a statutory right notwithstanding the vendor's reservation of the exclusive privilege of working such mines. *House v. Palmer*, 13, 104

ADVERSE POSSESSION. *Continued.*

80. *Mining during the mining season.* *Wilson v. Henry*, 1, 152

81. *Strict construction* always to be placed on evidence of adverse possession and every presumption is to be made in favor of the true owner. The party whose title is to be destroyed or remedy barred, may properly stand on the letter of the statute, and insist upon a strict compliance with its conditions, *Id.*

82. *Evidence* tending to show that claimant by adverse possession has no claim by purchase is inadmissible, as it does not apply. *National Co. v. Powers*, 1, 234

83. *Case of trust distinguished from co-tenancy.*—In cases of express trust or of direct confidence, the evidence to show a denial of the relation between the parties must be of stronger character than if the case be that of co-tenancy alone, but in all cases there must be proof of such positive acts or continued conduct, as tend to bring home notice to the party to be affected. *Susquehanna Co. v. Quick*, 1, 202

AFFIDAVIT.

1. *Jurat omitted by mistake.* *Capner v. Flemington Co.*, 7, 263

2. *Chancery practice.*—Upon motion for injunction complainant may read affidavits filed before the answer is filed; and after that he may read further affidavits, but not on the question of title. *U. S. v. Parrott*, 7, 335

8. *Denial of equities—Affidavits.*—If the answer to a bill for injunction to restrain mining upon a quartz ledge claimed by both parties, denies all the equities of the bill, and the bill is not supported by affidavits, the injunction must be dissolved. *Real Del Monte Co. v. Pond Co.*, 7, 453

AGENT.

A—APPOINTMENT: PROOF OF AGENCY.

B—RELATION TO PRINCIPAL.

C—RELATION TO THIRD PARTIES.

D—POWERS OF.

E—RATIFICATION.

F—REVOCATION.

G—ADMISSIONS BY.

H—COMPENSATION.

A. Appointment: Proof of Agency.

1. *Implied agency* of corporate officers. *Moss v. Rossie Co.*, 1, 289
Cumberland Co. v. Sherman, 1, 323

2. *A general agency may be inferred* from facts and circumstances; from the habit and course of dealing. *Lyell v. Sanbourn*, 1, 313

8. *Proof of agency.*—An agency for the care of property may be both created and proved by parol. *Hardenbergh v. Bacon*, 1, 352

4. *Evidence.*—H. having alleged that B. was her agent with reference to certain mining property, was properly allowed to show the nature of her claim, though the evidence did not show title in her. *Id.*

5. *Subject-matter of agency.*—A claim of title may be the subject-matter of an agency, as well as property to which the title is perfect. *Id.*

6. *Appointment of agent by corporation* is as in case of persons

AGENT—Appointment. *Continued.*

unless charter limits method of appointment. Parol evidence as to this allowed. *Carey v. Philadelphia Co.*, 1, 349

7. *Sale under power of attorney not under seal.* *McDonald v. Bear River Co.*, 1, 626

8. *Renewed agency must be proved.*—Third parties can not presume a renewal of the agency from the mere fact of the old agent being found conducting operations after termination of agency. *Van Dusen v. Star Quartz Co.*, 3, 26

9. *Statements of the assumed agent are not proof of agency or of its renewal.* *Id.*

10. *Agent holds at pleasure of principal—Exception.*—The only exception to the rule is when the power of attorney held by the agent is coupled with an interest in the property, founded upon a valid consideration. *Flagstaff M. Co. v. Patrick*, 4, 19

11. *Contract—Authority of agent.*—The appointment of an agent for a corporation to make a contract for work and labor need not be made under seal or by resolution of the board but his authority can be inferred from the admitted relations of the agent to the corporation, or from the course of business. *Crowley v. Genesee Co.*, 4, 71

12. *Annual hiring.*—A written contract by which a party is employed "to act as agent," etc., to be paid \$3,000 "in equal quarterly payments," is a hiring for a year. *Kirk v. Hartman*, 11, 450

13. *Letters proving agency submitted to jury—Jury's finding to stand.* *Pence v. Langdon*, 13, 83

14. *Agency a question of fact for the jury.* *Kelsey v. Northern Light Co.*, 13, 497

15. *The fact of agency can not be proved by the declarations of the alleged agent alone.* *Omaha Co. v. Tabor*, 16, 184

B. Relation to Principal.

16. *Agent as trustee.*—An agent who buys the outstanding title to his principal's mining claim, may be treated by his principal as trustee in effecting the purchase and taking the title; he can not act on the subject-matter of his trust for his own benefit. *Hardenberg v. Bacon*, 1, 352

17. *Agent can not assume adverse relation while the relationship exists.* If employed to sell he can not buy, and *vice versa.* *Deep River Co. v. Fox*, 1, 296

18. *Distinction between ministerial and other agents.*—But this rule applies only to those agents of trust and not service; not to those employed merely as instruments. *Id.*

19. *The rule not applied to agent forcing legal sale for just debt.* *Id.*

20. *Agent can not contract for profit to himself in violation to his duty to his principal.* *Cumberland Co. v. Parish*, 1, 428

21. *The rule includes corporate officers.*—Directors and managers of corporations are within the rule guarding transactions between trustees and beneficiaries, or principals and agents. *Id.*

22. *Profit at expense of company.*—In case of corporate directors there is an inherent rule that they must not use their positions to ad-

AGENT—Relation to Principal. Continued.

vance their own interest as distinguished from that of the corporation. *Id.*

23. *Burden of proof*, where a fiduciary relation existed, is upon the trustee to show the perfect fairness of his transaction with his beneficiary, and this by proof, independent of the instrument under which he claims. *Id.*

24. *Agent can not act for both parties without their consent.* *Finerty v. Fritz*, 1, 437

25. *Rights of agent and agent's partner.*—B. was the agent of H. with reference to certain mining ground to which H. claimed title. B. was also in partnership with W., and B. & W. purchased the outstanding title to the property. *Held.* that B. & W. took as tenants in common; that B. took an undivided half as trustee for H., his principal, and that W. took the other undivided half in his own right; that W. had the same right to purchase the outstanding title as any other person, and that his partnership imposed no disability upon him in respect to the property. *Hardenbergh v. Bacon*, 1, 353

26. *Agent can not make secret profit.* *Collins v. Case*, 1, 91

27. *Agent must account for his own subscription.* *Id.*

28. *Agent can not purchase.* *Cumberland Co. v. Sherman*, 1, 323

29. *Steward taking lease from his principal, his character as agent accompanying him as tenant, deprives him of the benefit of an objection that might be competent to another person, as to delay or neglect of the plaintiff in making a demand upon the defendant for the excess of coal taken out under his lease.* *Beaumont v. Boulton*, 1, 253

30. *A general account may be decreed against the tenant, who is also agent, with respect to fraud, concealment and breach of trust.* *Id.*

31. *Acceptance of service of summons by an attorney in fact for a corporation, who is not its general manager, and has not express authority to appear in suits against it, can not bind it.* *Lamb v. Gaston Co.*, 1, 381

32. *An agent can not purchase on account of another, that which he sells on account of himself.* *Marye v. Strouse*, 2, 294

33. *Refusal to agent to receive ore is a refusal to his principals and no notice to them personally is necessary.* *Grove v. Donaldson*, 2, 507

34. *Organizers, acting as corporate agents, can not take profit against the company.* *Simons v. Vulcan Oil Co.*, 6, 633

35. *Receipt of money by an agent is prima facie evidence of receipt by a principal; and the receipt by one partner, that it is by the firm.* *Id.*

36. *The knowledge of the agent of the vendee is as binding upon him as his own knowledge.* *Tuck v. Downing*, 7, 84

37. *Agent to purchase may repudiate his agency and act for himself, using his own funds, in which case he can not be declared a trustee for his principal, although he may have misled the latter.* *First Nat. Bank v. Bissell*, 11, 547

38. *Agent to convey property may, after agency ceases, purchase same property.* *Cons. Rep. Mt. Co. v. Lebanon Co.*, 15, 490

39. *Corporation formed by agent.*—A new company, organized by an agent, in which company he is a director and principal stockholder,

AGENT—Relation to Principal. Continued.

taking the land, with full notice of the facts attending the purchase, will stand in no better position than the agent. *Id.*; *Cumberland Co. v. Sherman*, 1, 322

40. *Liability for acts of agents, ultra vires.*—Principals are bound only by the acts of agents done within the scope of their authority. *Alexander v. Cauldwell*, 5, 650

41. *Fiducial relation of local agent to the principal.*—The understanding by one on the ground to procure a purchaser for a mining claim, the owners being non-residents, and having no other agent in the territory to look after the claim, constitutes a fiduciary relation in such person to such property. *Lockhart v. Rollins*, 16, 16

42. *Such agent can not relocate a mining claim in his own behalf to the injury of his principal. Id.*

C. Relations to Third Parties.

43. *Clandestine partnership* by an agent with a party supplying timber to the mine of his principal is unlawful. He will be decreed to account for and pay over the profits. *Massey v. Davies*, 1, 247

44. *Substitution.*—An agent who can not purchase directly from his principal can not act for another in such purchase. *The Cumberland C. & I. Co. v. Sherman*, 1, 322

45. *Contract to pay price in excess of authority*—*Laches. Atlas Co. v. Johnston*, 1, 388

46. *Advances, in name of principal, for agent's benefit.*—Parties discounting paper drawn by an agent upon his principal, are bound to act as prudent men in the light of all facts within their knowledge bearing on his authority. *N. Y. Iron Mine v. Citizens Bank*, 2, 172

47. *Agent not responsible to extent of principal.*—The agent of the works sued was wrongfully made a party defendant to bill in equity for injunction against trespass by mining, and for account of ore taken; all the trespasses complained of were done by subordinates under him, and were for the sole benefit of the works. *Stockbridge Co. v. Cone Iron Works*, 6, 817

48. *Contract by agent, not disclosing his principal, makes principal liable in case of a breach.* By contracting in his own name the agent only adds his personal obligation to that of his principal. *Youghiogeny Co. v. Smith*, 10, 189

D. Powers of.

49. *One person acting as agent for two companies.*—Such a double authority would dispense with such formalities as could not be complied with where one man acts for both companies. *Adams Co. v. Senter*, 1, 241

50. *Transfer of property from one company to another, when the same person is agent for both. Id.*

51. *Authority of such agent to exchange supplies. Id.*

52. *General powers of superintendents, or general agents in charge of mines, will be recognized without proof, as covering all the ordi-*

AGENT—Powers of. *Continued.*

nary local business of the concern; and persons dealing with them have a right to assume this, unless otherwise notified. *Id.*

53. *Agent's power to hire.*—An agent of a mining company may employ laborers in the business of the company, but he can not pledge the faith of the company to other persons. *Cons. Gregory Co. v. Raber,* 1, 405

54. *Power of mining company to buy timber—General agent.*—There is no lack of power in a mining company to buy or sell timber, and a purchase or sale of it by a general agent is within his powers, and will be upheld. *Adams Co. v. Senter,* 1, 241

55. *Agent can not pledge credit, even to save sacrifice.* *Hawthorne v. Bourne,* 1, 285

56. *Authority of mining superintendent to borrow money.* *Bread v. First Nat. Bank,* 1, 467

57. *Superintendent can not borrow money—Special power, construed.* *Brown v. Byers,* 1, 308

58. *General power of attorney implies no power to make promissory note.* *Washburn v. Alden,* 1, 820

59. *Hire of hostler for agent to do business for more than one company is not a contract within the power of the agent to bind the defendant company.* *Cons. Gregory Co. v. Raber,* 1, 405

60. *Agent can not change terms of written contract by the principal unless authorized to do so.* But a parol contract made by the authorized agent of a corporation, is an express promise of the corporation. *Lonkey v. Succor Co.,* 1, 411

61. *Authority to draw post-dated drafts.* *New York Mine v. Citizens Bank,* 2, 171

62. *Notice of equities to holder of draft.*—Where knowledge of circumstances that would excite suspicion in the mind of a prudent man on becoming the transferee of negotiable paper is not enough to affect the paper in his hands with pre-existing equities, he must have actual notice of such equities, or at least, knowledge such as would make his taking the paper with the intention of enforcing it, an act of bad faith. *Id.*

63. *Effects of an irrevocable power of attorney made by corporation.* *Davis v. Flagstaff Co.,* 2, 660

64. *Authority of agent of corporation exercised in excess of the corporate powers.* *Alexander v. Cauldwell,* 5, 650

65. *Acts of deputy.*—A statute requiring surveys for purposes of settlement to be made by the county surveyor is sufficiently complied with if made by a person in his employ and certified as his official act. *Robinson v. Imperial Co.,* 10, 870

66. *Agent applying for patent.*—Though there may be circumstances where an application for patent would not be advantageous to a company, the mere allegation of such fact is not sufficient. *Sherman v. Clark,* 7, 488

67. *Superintendent working without control of the president or board of trustees is not necessarily working to the injury of the stockholders.* *Id.*

AGENT. *Continued.*

E. Ratification.

68. *Evidence of authority* may be shown by the acts and declarations of the officers of a mining company relative to agents' expenditures in litigation and in compromising claims. *Wild v. New York Co.*, 1, 418

69. *The admission of the corporate officers*, when informed of the claim, were held to amount to a ratification. *Cons. Gregory Co. v. Raber*, 1, 405

70. *The principal may at its option* adopt a sale so made to its agent, or may have it set aside, without proof of actual fraud. *Cumberland Co. v. Sherman*, 1, 322

71. *Duty of principal to either ratify or repudiate.* *Breed v. First Nat. Bank*, 1, 487; *Union Co. v. R. M. Bank*, 1, 488

72. *Of unauthorized acts.* *Union Co. v. R. M. Bank*, 1, 488

73. *Principal and agent.*—The rule is that whenever a party undertakes to act as the agent of another, if he does not possess any authority therefor, or if he exceeds his authority, he will be personally responsible to the person with whom he is dealing on account of his principal. Ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal. *Charles v. Eshelman*, 2, 65

74. *Of act of agent.*—It is too late to dispute the authority of Stewart to make the contract, after accepting and paying for the services of Tierney for seven months; such acts furnish strong grounds to presume a ratification. *Boulder Valley Co. v. Tierney*, 2, 381

75. *Sale to agent confirmed with reluctance.*—The sale to the agent disapproved and only allowed to save further loss. *Wren v. Kirton*, 2, 408

76. *Of unauthorized sale—Estoppel.*—An unauthorized sale of land can be ratified only in writing or by such conduct as creates an estoppel; and such ratification must be by a party informed of the facts. And there can be no estoppel, unless a party is misled to his prejudice by the one against whom it is set up and does material acts relying upon conduct well calculated to mislead him. *Palmer v. Williams*, 14, 580

77. *Foreman's purchase after his agency has ceased.*—Company is liable for it unless it has given notice of lapse of agency to the parties selling the goods. *Van Dusen v. Star Quartz Co.*, 3, 26

F. Revocation.

78. *Removing agent and replacing him with a new agent is no change of possession.* *Flagstaff Mining Co. v. Patrick*, 4, 19

79. *Power to appoint and remove agents* rests with the company itself and can not be shifted or transferred by any contract made by the board of directors. *Id.*

80. *Consent to sell at a certain time at a certain price* can not, if the sale falls through, be construed to hold the property for sale at that price at a subsequent time. *Palmer v. Williams*, 14, 580

AGENT. *Continued.*

G. Admissions by.

81. *Declarations of an agent employed to sink an oil well are not evidence of the reasons of the principal for ceasing to operate.* *Karns v. Tanner*, 5, 289
82. *Knowledge of corporate agent, where agent is interested.* *Wickersham v. Chicago Zinc Co.*, 5, 536
83. *Agent's declarations touching principal's affairs outside the field of agent's authority have no weight from that authority.* *Herbert v. King*, 5, 303
84. *Declarations of agent beyond the res gestæ.* *Mateer v. Brown*, 7, 156
85. *Unauthorized declarations of agent, not evidence.* *Hanover Co. v. Ashland Co.*, 10, 205
86. *The testimony of interested agents of a corporation against its interest partakes of the nature of personal admissions against the corporation.* *Durham v. Carbon Coal Co.*, 15, 380

H. Compensation.

87. *Recoupment—Measure of damages for wrongful discharge.* *Williams v. Chicago Co.*, 1, 397
88. *Contract construed—Statute of frauds—Coin contract—Measure of damage for unjustifiable discharge—Traveling expenses.* *Tufts v. Plymouth Co.*, 1, 371
89. *Personal liability of stockholder—Agent not a servant.* *Hill v. Spencer*, 1, 414
90. *When entitled to commission, though sale not made.* *Finerty v. Fritz*, 1, 437
91. *Commissions.*—When an agent to sell negotiates conditional sale, as between himself and his principal, the execution and delivery of title bond to the purchaser or obligee, may be regarded as a sale of the property during the option; and the agent may negotiate a further sale of the same property for the obligee without forfeiting his commissions. *Id.*
92. *Agent to sell, selling to himself, not entitled to commission.* *Id.*
93. *Action for trifling or pretended services.* *La Crosse Co. v. Scudder*, 1, 446
94. *Agency and salary pending sale or company organization.* *Pinch v. Anthony*, 2, 593

AGRICULTURAL LANDS.

1. *Criterion between agricultural and mineral lands.* *Ah Yew v. Choate*, 1, 492
2. *The patent is the record of the State that the land was subject to location, and has been located pursuant to the terms prescribed by law. It may further record a judgment of the State as to the quality and characteristics of the land.* *Id.*
3. *Hotel and town lots on mining ground.*—The acts giving the right to mine upon land appropriated for grazing and agricultural purposes, do not apply to the case of a town lot occupied for hotel purposes. Lands settled in good faith and built up as mining towns, must be pro-

AGRICULTURAL LANDS. *Continued.*

- tected as incidental to the business of mining. *Fitzgerald v. Urton*, 12, 198
4. *Entry by miner upon agricultural land held adversely*, *Lentz v. Victor*, 12, 211
5. *Prior agricultural claim*. *Levaroni v. Miller*, 12, 232
6. *Mining under crops—California statute allowing miners to enter on agricultural claims*. *Rupley v. Welch*, 4, 243; *Burdge v. Underwood*, 4, 517
7. *Location of farming claims in mining districts*. *Smith v. Doe*, 5, 218
8. *Conflicting appropriation of ranchman and miner*.—The ranchman can hold against the miner only by showing that his crops or trees were planted before miner located. *Ensminger v. McIntire*, 14, 440

ALIENS.

1. *Aliens can not locate*. *Golden Fleece Co. v. Cable Co.*, 1, 120; *Anthony v. Jillson*, 16, 26; *North Noonday Co. v. Orient Co.*, 9, 529
2. *Alien and citizen, joint location, valid for citizen*. *Id.*, 1, 121
3. *Relocation* is completely permissible when first location is fully abandoned or was by an alien. *Id.*
4. *Mining rights confined to citizens*. *Chapman v. Toy Long*, 1, 497
5. *Treaty with China*. *Id.*
6. *Foreign miners' license*. *Ah Yew v. Choate*, 1, 492; *Mitchell v. Hagood*, 1, 506
7. *Tax*.—The mere fact that a Chinaman resides in a mining district, does not subject him to the foreign miners' tax. *Ah Pong, ex p.*, 1, 507
8. *Alienage, a matter between the subject and ruler*, and not to be taken advantage of by a citizen against an alien. It is the office of the government only, to declare a forfeiture of the alien's estate. This rule (the court seem to intimate) would apply to the case of possessory mining claims on the public domain located or purchased by aliens and citizens adversely to each other. *Territory v. Lee*, 6, 248
9. *Citizenship of locator may be proved by his affidavit* under § 2321, U. S. Revised Statutes, in controversies concerning title, and in land office proceedings. *North Noonday Co. v. Orient Co.*, 9, 524
10. *The presumptions* controlling, and the difficulty of proving citizenship in many cases, considered. *Id.*
11. *Naturalization* is a question of fact for the jury. *Id.*, 9, 529
12. *Naturalization—Affidavit as proof*.—A foreign born son of an alien may be naturalized, or by the naturalization of his father during his minority, as tending to prove citizenship, the affidavit of the party is made competent evidence for all purposes, under the Mining Act of May 10, 1872. *Id.*, 9, 529
13. *Alien may locate, and sell to citizen, who then, on possession, has valid title*. *Id.*
14. *Location by citizen and alien*.—Where a citizen and an alien locate a claim, not exceeding the amount of ground allowed to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen passes a valid title. *Id.*

ALIENS. *Continued.*

15. *Citizenship must be pleaded and found.* *Rosenthal v. Ives*, 15, 324
16. *As there was an omission to find in these cases that plaintiffs were citizens*, or had declared their intention to become such, held, that the judgment should be reversed, and the causes remanded, with directions to the court below to find on this question, from the evidence taken at the trial, if sufficient, and if not, upon such evidence as may be adduced, and proceed to render judgment accordingly. *Id.*
17. *Declaration of intention not retroactive.*—Where an alien made his declaration of intention to become a citizen the day after the date of the location, this did not operate to validate the claim. *Anthony v. Jillson*, 16, 26
18. *Averment of citizenship not necessary to enforce trust.* *Moritz v. Lavelle*, 16, 226

ALTERATIONS AND ERASURES.

1. *Unauthorized alteration in assessment roll.* *Nevada v. Manhattan Co.*, 14, 149
2. *Effect of alterations and erasures.* *Id.*

AMENDMENT.

1. *To refuse to allow the amendment of an answer when invalid defense is relied upon*, is not error but matter of discretion, the abuse of which can alone justify interference by the Appellate Court. *Gillan v. Hutchinson*, 2, 318
2. *Amendment in Appellate Court—Replication treated as complaint.* *Monroe v. Northern Pacific Co.*, 2, 632
3. *Amendments to a complaint filed by leave of court* before the arguments were concluded, will not be disregarded by the Supreme Court unless the record shows that counsel for defendant were present and objected. Nor does it furnish ground for wholly disregarding the amendments, that the minutes of the clerk show that leave was obtained to file an amended complaint instead of amendments to the complaint. *Reynolds v. Hosmer*, 4, 657
4. *Court may allow amendment to a declaration brought in the name of plaintiff*, as administratrix, showing that she declares as widow of the deceased. *Litchfield Co. v. Taylor*, 10, 684
5. *Bill in equity amended after trial.* *Byers v. Franklin Co.*, 12, 27
6. *Amendment after case submitted—New testimony.*—An amendment by striking out a portion of the complaint, after the case has been submitted, will not entitle the defendant to introduce more testimony if the issues are still unchanged. *Ahrens v. Adler*, 12, 114
7. *Refusal to allow a second amended answer*, the affidavit not showing what the defense is nor why it was not interposed before, is no abuse of legal discretion. *First Nat. Bank v. How*, 12, 194
8. *Amendment by changing form of action.* *Smith v. Bellows*, 12, 157
9. *Rehearing after bill amended*, is a matter the allowing of which rests wholly in the discretion of the trial court. *Hoyt v. Smith*, 12, 325

AMENDMENT. *Continued.*

10. *Amendment after verdict.*—It is no abuse of discretion for the court to refuse to allow an amendment to the answer after facts had been submitted to and the findings made by the jury. *Sears v. Collins*, 12, 400
11. *Leave to amend a hopeless bill* will not be given. *Pollard v. Clayton*, 13, 835
12. *Amendment of pleadings after hearing.* *Hamilton v. Southern Nevada Co.*, 15, 815

ANNUAL LABOR.

1. *Extent of the annual period.*—Under the act of Congress of May 10, 1872, the owner of a lode, who has performed his annual labor for one year, has the whole of the following year in which to perform his annual labor for that year. *Belk v. Meagher*, 1, 522
2. *Claims located prior to 1872.*—On mining claims located prior to 1872, the owner was required to do at least ten dollars worth of work on each one hundred feet before January 1, 1875, or on that date the claim became void, unless he was then in the actual possession, and had resumed work thereon. *Little Gunnell Co. v. Kimber*, 1, 536
3. *Work by third parties—Resuming work before re-location.* *Id.*
4. *Amendment to § 2324, Rev. Stat. construed.*—The act of Congress of Jan. 22, 1880, amending § 2324, Rev. Stat., did not act retrospectively, and its first application to claims located since May 10, 1872, would be Jan. 1, 1881. *Slavonian Co. v. Perasich*, 1, 541
5. *Threats to prevent completion of annual labor*, if made at a distance from a mine, will not excuse a failure to attempt to do the work. *Id.*
6. *Resuming work.*—The original locator has the exclusive possessory right until the time for annual labor has passed, and if before another enters on his possession and re-locates the claim, he resumes and performs work to the extent required by law, his rights are precisely what they would have been if no default had occurred; and under the act, the work may be done at any time within the entire year. *Belk v. Meagher*, 1, 510; *Jupiter Co. v. Bodie Co.*, 4, 418
7. *Entire year allowed for labor—Trespassers.* *Atkins v. Hendree*, 2, 328; *Belk v. Meagher*, 1, 522
8. *Resumption after year expired.*—The statute requires \$100. work on each claim located since May 10, 1872, in each year; but if, after the expiration of the year, before other rights attach in favor of re-locators, the owner has resumed work and is actually engaged in developing his claim, he preserves his right. *North Noonday Co. v. Orient Co.*, 9, 580
9. *Performance of labor a condition precedent.*—The Idaho statute requires a locator to do \$100 worth of work on each 200 feet of a claim within six months from the date of record. *Held*, that failure to do such work within such time was equivalent to abandonment. *Kramer v. Settle*, 9, 561
10. *Statutory method of making prima facie proof of annual labor stated.* *Id.*

ANNUAL LABOR. *Continued.*

11. *Construction of law* requiring work to be performed is to favor the diligent. *Id.*

12. *Status of purchasers in regard to previous labor* is worthless if they fail to see that the proofs of labor have been filed. *Id.*

13. *Failure to do annual labor need not be specially pleaded in adverse claim suit.* *Steel v. Gold Lead M. Co.,* 15, 292

14. *By statute, prima facie proof of annual labor may be made by affidavit* filed within the six months following the annual period; construed, to allow it within the annual period. *McGinnis v. Egbert,* 15, 329

15. *The annual labor affidavit may embrace more than one claim.* *Id.*

16. *If the work is resumed on a claim open to re-location, but before re-location is actually made, it can not be made.* *Id.*

17. *Annual Labor Act of 1880.*—The congressional act of January 22, 1880, fixed the first day of January as the commencement of the annual period for all unpatented claims then existing. The act took effect from the date of its passage. The object of this amendment of the law was to render the annual periods uniform as to all mining claims, and the exemption of claims from the performance of labor for a portion of the year in certain cases was a necessary result of the amendment. *Id.*

18. *Performance of the specified amount of labor annually is a condition* which must be complied with. *DuPrat v. James,* 15, 341

19. *Labor before re-location.*—The original locator of a mining claim has a right to perform the labor after the failure, and still have the benefit of his location, if the labor is done before re-location. *Id.*

20. *Failure to do annual labor must be specially pleaded.* *Renshaw v. Switzer,* 15, 345

21. *Re-entry by original claimant before re-location complete.* *Pharis v. Muldoon,* 15, 348

22. *Annual labor need not be kept up after entry in land office.* *Aurora Hill Co. v. 85 M. Co.,* 15, 581

23. *The burden of proving forfeiture by failure to do annual labor is on the party asserting the forfeiture; and the proof must be clear and convincing.* *Hammer v. Garfield Co.,* 16, 125

24. *Tender by co-tenant to co-tenant of his proportion of annual labor makes void any further proceedings to forfeit a title.* *Sawyer v. Turner,* 16, 260

25. *Annual labor by working one of a group of claims.* *Jupiter Co. v. Bodie Co.,* 4, 418; *Bradley v. Lee,* 4, 470; *De Noon v. Morrison,* 16, 33

26. *Labor upon claim by relation and intendment.*—Efforts to procure machinery, without which it is impossible to work the mine because of the inflow of water, should be justly considered as work done upon the claim, by relation and intendment. *Packer v. Heaton,* 4, 447

27. *Work done upon ground adjoining to, and to develop the mine,*

ANNUAL LABOR. *Continued.*

is work done upon the claim within the true meaning of a rule requiring labor. *Mount Diablo Co. v. Callison*, 9, 616

28. *Annual labor done outside of claim.* *Kramer v. Settle*, 9, 561

29. *Definition of "work on a claim."* *Mount Diablo Co. v. Callison*, 9, 616

30. *Road-building*, counted as annual labor. *Id.*

31. *Work advancing one general system, comprising several contiguous claims*, is work on all the claims intended to be developed by it. *Id.*

32. *Improvements on one of a group of locations constituting one claim*, or work done at a distance from the claim to improve it, apply as labor under the mining acts. *St. Louis Smelting Co. v. Kemp*, 11, 673

33. *Care of agent (watchman) of idle mine counted as annual labor.* *Lockhart v. Rollins*, 16, 16

34. *Labor contracted for and performed* will count as the annual expenditure though not yet paid for. *Id.*

35. *The proposition "that all efforts made and work done outside of the limits of the claim in dispute, with a bona fide intent to work the claims, are justly considered as work done upon the claims by relation and intendment,"* can not be maintained. *McGarrity v. Byington*, 2, 311

36. *Traveling expenses—Lost time—Search for water.*—Traveling about regarding matters connected with a mining claim is in no sense labor performed on the mine. *DuPrat v. James*, 15, 341

APEX.

1. *The top or apex* is the end or edge or terminal point of the lode nearest the surface of the earth. If found, at whatever depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. *Iron Silver Co. v. Murphy*, 1, 548; *Stevens v. Williams*, 1, 557

2. *Location other than at top.*—No location can be made on the middle part of a lode, or otherwise than at the top and apex, which will enable the locator to go beyond his line. *Iron Silver Co. v. Murphy*, 1, 548

3. *Location void beyond where apex leaves side lines—Description in verdict.* *Id.*

4. *Contact veins—Rock in place—Dip.*—The joinder or union of rocks differing in character, as porphyry and limestone, is not a mineral vein or lode, unless the intervening space contains ore of appreciable value; and the fact that ore is sometimes found between such rocks does not change the case. If the ore does exist between the two varieties of rock, then, in order to constitute a lode or vein, the rock must be in place, *i. e.*, in its original position in the structure of the formation. If the plaintiffs have the apex of a lode, as thus defined, upon their ground, and it descends thence into defendants' ground, the plaintiffs have the better title. *Stevens v. Gill*, 1, 573

5. *Swell in the vein*, though it approach nearer the surface of the

APEX: *Continued.*

earth than the apex, is not the true apex, for it is not a terminal of the vein. *Stevens v. Williams*, 1, 563

6. *If the apex is on ground not the plaintiff's* he can not recover. The burden is upon him to show that the lode is in his ground, that he has the apex of it, and that it extends in well defined boundaries from his territory into that of the defendants. *Leadville M. Co. v. Fitzgerald*, 4, 380

7. *Location must cover apex.*—To the extent that a lode, in its onward course or strike, departs from the side lines of the patented location, the plaintiff in ejectment is not entitled to recover. *Johnson v. Buell*, 9, 503

8. *Claimant must show apex.* *Hyman v. Wheeler*, 15, 519

9. *Side lines must include apex—End lines must be parallel.* *Iron Silver Co. v. Elgin Co.*, 15, 641

10. *Where a vein leaves the side line* its right to be followed on the dip is bounded by a plane drawn parallel to its end lines across the claim and protracted from the point where it departs from the side line. *King v. Amy Co.*, 16, 38

11. *The location need not be substantially parallel to the side lines* so as to make the dip substantially at right angles to the side lines, and in protracting a line to bound the following of the vein on the dip, a line drawn at right angles to the strike of the vein is not the line contemplated in such cases under the statute. *Id.*

See DIP; SIDE LINES.

APPEAL.

1. *On appeal from a judgment*, the court will look into the evidence for an explanation of errors assigned. *Columbia Co. v. Holter*, 2, 14

2. *Questions not raised below* will not be discussed or considered in the Appellate Court. *Spencer v. Kunkle*, 2, 18

3. *Copies required on appeal.*—Sending up the original papers is not to be suffered, even where there is consent. *Emmons v. McKesson*, 7, 409

4. *Showing necessary on appeal.*—An appellant for a reversal of an order or judgment of a lower court must make such an affirmative showing as will negative at least the probability of the correctness of such order or judgment, for the presumption is in its favor. *Lady Bryan Co. v. Lady Bryan Co.*, 7, 478

5. *Modification of judgment on appeal.*—Respondent may avoid reversal of his judgment by so modifying it as to make it, in the court's view, just. He pays cost of appeal. *De Costa v. Massachusetts Co.*, 10, 94

6. *Absence of showing that statement contains all the evidence on any fact involved in the case*, will be reason for concluding that every fact essential to make out the respondent's case was sufficiently proven. *Bowker v. Goodwin*, 10, 149

7. *Findings not preserved in record.*—Findings not embodied in a statement properly certified will not be considered on appeal. *Id.*

8. *Conflict of evidence as to collateral facts.*—The rule that the

APPEAL. *Continued.*

findings of a *nisi prius* court will not be disturbed on appeal, where there is a conflict of evidence, applies also to collateral facts. *Id.*

9. *Jurisdiction on appeal—How determined.* *Skillman v. Lachman*, 11, 881

10. *Appeal can only be dismissed by Appellate Court.* *McGarrahan v. New Idria Co.*, 11, 641

11. *When the trial is to the court*, the finding will stand unless clearly against the weight of evidence. *Dickson v. Moffat*, 12, 606

12. *Action for continued injury not prevented by appeal pending.* *Toombs v. Hornbuckle*, 13, 430

13. *Practice in Court of Appeals on exceptions to evidence.* *Basshor v. Forbes*, 13, 520

14. *Practice on appeal—Finding facts.*—It is the duty of the Appellate Court to recite in its final order, judgment or decree, the facts found by it, if its decision (reversal) rests on them. If it does not, and no error of law is found in the record of the trial court, a judgment of reversal by the Appellate Court will be erroneous. *Coalfield Co. v. Peck*, 13, 628

15. *Weight of evidence not important on appeal in case of conflict.*—Though the Supreme Court may consider a judgment of a district court against the weight of evidence, it will not disturb it on that ground if there is a substantial conflict of evidence. *Brewster v. Sine*, 14, 573

16. *Appeal not dismissed for neglect of rules of court.* *Pearson v. Martin*, 15, 95

17. *Inability of Appellate Court to review conflicting testimony.* *Chadbourne v. Davis*, 15, 620

18. *Certificate to statement on appeal as required by statute would be:* "The foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause." *Overman Co. v. American Co.*, 2, 251

19. *Questions of fact are open on appeal* precisely as they were before the trial, where a cause comes on appeal wholly in the shape of depositions or documentary evidence. *Durham v. Carbon Coal Co.*, 15, 380

20. *Review on imperfect record.*—No appeal lies from the decision of the court below refusing to sustain a motion for nonsuit when the grounds of the motion do not appear in the record. *McGarritty v. Byington*, 2, 311

21. *Dismissal of appeal for delay in docketing.* *Sparrow v. Strong*, 2, 320

22. *Auditor's report.*—No appeal lies from a judgment of the Court of Common Pleas rendered upon the report of an auditor, in which the evidence is stated in detail, without submitting the auditor's report to the jury, or its being agreed upon by the parties as a statement of facts. *Chapman v. Briggs Co.*, 2, 524

23. *No review of orders not in judgment roll.*—The ruling of the court in striking out a portion of the answer can not be reviewed upon

APPEAL. *Continued.*

appeal, if it forms no part of the judgment roll. *Feeley v. Shirley*,
12, 133

24. *No review of facts.*—This court will not review the action of the trial court sitting as a trier of fact in a law case. *Snyder v. Burnham*,
15, 563

APPROPRIATION.

1. *Common law water rights changed on Pacific slope.* *Atchison v. Peterson*,
1, 583

2. *Title by occupation and its incidents.*—The public mineral land is open to appropriation by the act of occupancy, after which it may be transferred by any authorized mode, or the appropriator may abandon it. *Richardson v. McNulty*,
1, 11

3. *Miners' rights not paramount.*—The miner or ditch owner must exercise his rights subject to prior vested rights in others. *Wixon v. Bear River Co.*,
1, 656

4. *The right of a locator of a mining claim to the possession of his claim, and to appropriate the mineral therein, is full and complete so long as the existing mining law remains in force.* *Chapman v. Toy Long*,
1, 497

5. *Priority in appropriation—Notice.*—Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent on the ownership of the land through which the water flows. The notice of intention to appropriate water must be sufficient to put a prudent man upon inquiry. *Kimball v. Gearhardt*,
1, 615

6. *Water rights—Test of priority.*—Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows. *Kelly v. Natoma W. Co.*, 1, 592; *Barnes v. Sabron*, 4, 673; *Thorp v. Woolman*,
8, 87

7. *Relation.*—The appropriation of water can not be constructive. It can not rest in intention. Yet, if prosecuted in good faith, it relates back to the commencement of the improvements by which appropriation was made. *Kelly v. Natoma Co.*, 1, 592; *Ophir Co. v. Carpenter*,
4, 640

8. *The doctrine of relation applied.* *Woolman v. Garringer*, 1, 675

9. *Posted notice of appropriation* and the continued prosecution of work, were sufficient to charge plaintiffs with notice of defendants' claim. *Id.*

10. *Title to water.*—V. acquired certain water rights for milling purposes in 1850. The defendants appropriated water from the same stream, forty miles above, for ditch purposes in 1851. In 1854 plaintiffs succeeded to the rights of V. *Held*, that if V. did not abandon his claim, the appropriation by defendants was limited to water not appropriated by V., and that plaintiffs might possibly maintain an action for diversion without connecting their title with V. *McDonald v. Bear R. Co.*,
1, 626

11. *Notice alone not a sufficient appropriation.* *Gottschall v. Mel-sing*,
1, 667

APPROPRIATION. *Continued.*

12. *Water rights.*—The appropriator of public lands belonging to the government is entitled to the use of streams and water-courses naturally flowing through such lands, as against persons subsequently appropriating and using the water of such streams. *Crandall v. Woods*, 1, 604

13. *Intervening appropriation of water.* *McDonald v. Askeur*, 1, 660

14. *Right of first appropriator of public mineral lands* includes right to use and divert water thereon. *Yankee Jim's Co. v. Crary*, 1, 196

15. *Lost by adverse possession—Grant presumed.*—Such right of the appropriator may be lost by the adverse possession of another. And after an adverse enjoyment for the period fixed by the statute of limitations, a grant will be presumed. *Id.*

16. *Running waters.*—He who first subjects running water upon the public domain to his use (mining or other) is the source of title in all controversies respecting it. *Basey v. Gallagher*, 1, 638

17. *Conflict of laws.*—The right by priority does not depend upon uniformity in the local laws, State legislation and decisions of courts, but in case of conflict between local custom and statutory regulation, the latter, as of superior authority, must necessarily control. *Id.*

18. *Change of the place where water is used.*—The prior appropriator of water has the right to change the place of use and divert the water to any other point, to the extent of his appropriation. Appropriation, use and non-use are the tests of his right; and place of use and character of use are not. *Woolman v. Garringer*, 1, 675

19. *Water rights—Diversion—Limited appropriation.*—The appropriation of water, in order to apply it to some useful purpose, secures a right which can not be infringed upon by a subsequent appropriation by others, but diverting the water from its natural channel for the purpose of drainage simply, is not an appropriation; and one who has appropriated water for a special purpose can not afterward appropriate the surplus to the detriment of others, who in the *interim* have appropriated that surplus. *McKinney v. Smith*, 1, 650

20. *Waste water.*—The right acquired by the appropriation of waste water from defendants' ditch is subordinate to that of the first appropriator, and liable to be determined at any time by his action, unless the water had been returned into its original channel, without any intention of recapture. *Woolman v. Garringer*, 1, 676

21. *Water rights—Diverting at different points.*—*Hobart v. Wicks*, 2, 1

22. *Diligence.*—To constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises—such assiduity as shows a *bona fide* intention to complete it in a reasonable time. *Highland Co. v. Mumford*, 2, 8

23. *Appropriation—What constitutes.* *Columbia Co. v. Holter*, 2, 14

APPROPRIATION. *Continued.*

24. *Extent of appropriation a question for jury.* *Nevada Water Co. v. Powell*, 4, 254
25. *Rights of subsequent appropriators of water.* *Proctor v. Jennings*, 4, 265; *Barnes v. Sabron*, 4, 673
26. *Conflicting mining and water claims—Prior appropriation controls.* *Jennison v. Kirk*, 4, 504
27. *Prior appropriation.*—If the ditch owner divert the natural water of the stream as well as that brought into it by him, then the prior appropriator would have a cause of complaint. *Hoffman v. Stone*, 4, 520
28. *Subsequent locators above and below.* *Hill v. King*, 4, 533
29. *In subordination to prior rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity as often as they choose.* *Butte Co. v. Vaughn*, 4, 553
30. *The right secured by priority of appropriation* should be regarded as perfect as if secured by prescription or express grant; the exercise of the right does not depend on the source of the right. *Kidd v. Laird*, 4, 571
31. *Change in use or place of user.* *Davis v. Gale*, 4, 604
32. *Prior appropriation—Ditch and mining claim.*—The case of conflict between a ditch and a mining claim is peculiar. The rule of prior appropriation can not be strictly applied. The governing maxim is rather *sic utere tuo ut alienum non ledas*. And it may be doubted whether a ditch, although recognized as real estate, is to be regarded with the same favor by a court of equity. *Clark v. Willett*, 4, 639
33. *Insufficient diligence in constructing ditch lets in interveners.* *Ophir Co. v. Carpenter*, 4, 640
34. *Facts not amounting to reasonable diligence.* *Id.*
35. *Date of appropriation*, where the work of appropriation is not prosecuted with diligence, although finally completed, is from the completion, and not from the original commencement of the enterprise. *Id.*
36. *Measurement of water appropriated* is to be made in the ditch or flume at its point of smallest capacity. *Ophir Co. v. Carpenter*, 4, 653
37. *Test of ditch capacity.* *Barnes v. Sabron*, 4, 673
38. *Division of water by intervals of time.*—If A has appropriated water during certain days in the week, or during a certain number of days in the month, B may appropriate it and become entitled to its use on the other days of the week or month. *Id.*
39. *Liberal construction.*—Notices of the appropriation of water are to be liberally construed. *Osgood v. El Dorado M. Co.*, 5, 37
40. *Second notice of appropriation is no abandonment of first.*—Such posting is an assertion of the claim. *Id.*
41. *Presumption of grant to first appropriator.*—In determining controversies for the possession of mining claims, water privileges and the like, the court proceeds upon the presumption of a grant from the government to the first appropriator of such claims and this presumption is held absolute in all such controversies. *Coryell v. Cain*, 5, 226

APPROPRIATION. *Continued.*

42. *The right of the miner is based on appropriation*, and the appropriator of the ledge is entitled to the rock broken from it, whether on or below the surface. *Brown v. '49 and '66 Mining Co.*, 9, 600

43. *Extent of title of appropriator.*—A prior appropriation of the public domain establishes a quasi private proprietorship, which entitles the owner to be protected in its quiet enjoyment against all the world but the true owner, except in the case of agricultural and grazing lands, as against the privileges granted to miners. *Tartar v. Spring Creek Co.*, 14, 371

44. *Mining claim subject to prior vested water rights.* *Irwin v. Phillips*, 15, 179

See DITCHES; WATER.

APPURTENANCES.

1. *Miners' houses* are ordinary and proper appurtenants to coal mines, and when on the premises and included in the lease, are part of the estate, and all the remedies of a landlord attach to them, even without express stipulation. *Spencer v. Kunkle*, 2, 18

2. *Description.*—A sheriff's deed purported to convey certain property, known as the "Monitor claims," together with appurtenances: *Held*, that the mere fact that the Monitor company purchased the Ohio Water Ditch and the water rights appurtenant thereto, would not constitute them appurtenances of the "Monitor claims." *Quirk v. Falk*, 2, 19

3. *Ore banks passed as appurtenances.* *Grubb v. Grubb*, 7, 228

4. *Omission of "appurtenances."*—Enumeration of incidents of real property which pass without the word. *Wright v. Chestnut Co.*, 12, 528

5. *A right of way can be used* by the owner of the dominant tenement only to land to which it is appurtenant. *Coleman's Appeal*, 14, 222

ARBITRATION.

1. *Action by part of the board.* *Williams v. Schmidt*, 2, 23

2. *Notice to parties* such that they can be heard is essential to the regularity and validity of the action of arbitrators, even where the body of arbitrators is organized according to the agreement of the parties. *Id.*

3. *Arbitration clauses* in deeds are not binding on the parties, so as to oust the jurisdiction of the court. *Mexborough v. Bower*, 2, 92

ASSAY.

1. *Mines sold on report of assayer.* *Weist v. Grant*, 2, 28

2. *Ore contract construed as to test of assay value.* *Kennedy v. Schwartz*, 2, 679

3. *Difference in assays.*—A refusal by defendant to adjust a difference in the assays as provided in the contract, would justify the court in adopting the plaintiff's assay if found to be correct. Neither party ought to reap a benefit by a failure to comply with the terms of the contract. *Id.*

4. *Assays subsequent to location tend to prove vein to have been discovered prior to location.* *Southern M. Co. v. Europa M. Co.*, 9, 518

ASSAY. *Continued.*

5. *Ore contract calling for battery assay to fix value of ore.*—Incorrectness of assay may be shown by any competent testimony to true value of ore. *Phipps v. Hully*, 15, 350

6. *The object of an assay is to give the true value of the ore, and the assay called for in the contract may be shown to be erroneous by assays otherwise taken, and by the clean-up.* *Id.*

7. *But if the assay be correct it controls the clean-up on a percentage contract.* *Id.*

ASSESSMENT.

1. *Forfeiture of stock—Ejectment no remedy.* *Smith v. Maine Boys' Tunnel Co.*, 13, 460

See PERSONAL LIABILITY; STOCK.

ASSIGNMENT.

1. *Sale of chose in action.*—The owner of slag can not sell and transfer a good title to it, when it is adversely possessed by another. While the subject of action it can not be sold. *McGoon v. Ankeny*, 1, 9

2. *Assignment to escape contribution.* *Mexican Co., In re*, 2, 36

3. *Status of assignor, to the contract, after assignment.* *Myers v. South Feather Riv. Co.*, 2, 541

4. *Effect of assignment of contract, as collateral.* *Id.*

5. *Payment to assignee.*—The holder of a contract assigned generally to him as collateral for a debt may receive the payments on the same; and the payments are not limited to the amount secured; any further payment becomes a debt from the assignee to the assignor. *Myers v. South Feather R. W. Co.*, 4, 566

6. *Assignee may elect if the contract allows election.* *Id.*

7. *Assignment before garnishment.*—The assignee of the fund has precedence. *Walling v. Miller*, 7, 166

8. *A claim for trespass is assignable and the assignee may sue in his own name under section 4 of the Practice Act.* *More v. Massini*, 7, 455

9. *An insolvent corporation may make an assignment by its directors, for the benefit of creditors.* *Ardesco Oil Co. v. North American Co.*, 8, 590

10. *An assignee is bound by the knowledge of his assignor.* *Beatty v. Gregory*, 9, 234

11. *An assignment after suit brought, in aid of a less formal assignment made before suit, is inadmissible.* *Skryme v. Occidental M. Co.*, 9, 371

12. *Judgment and assignment distinguished.*—An assignment is the act of the party, a judgment the act of the law. A judgment by confession can not affect a statute which provides for an equal distribution among all creditors in cases of assignments. *Breading v. Boggs*, 11, 236

13. *Assignment of account by partner.*—The assignee can not sue the company or attach its property if the partner could not. *Bullard v. Kinney*, 11, 343

14. *A right of action growing out of fraud by the defendants is assignable.* *Woodbury v. Deloss*, 12, 144

ASSIGNMENT. *Continued.*

15. *Right to damages does not pass by assignment of lease. Mine Hill Co. v. Lippincott,* 12, 555
16. *Suit by assignee of chose in action.*—Can be prosecuted if founded in tort, without regard to the citizenship of the assignor. *Van Dokkelen v. Cook,* 13, 421

ASSUMPSIT.

1. *Money paid by one party to satisfy the debt of another* may be recovered in assumpsit. *Cook ads. Linn,* 2, 49
2. *Special agreement must be declared on.*—"Ore tickets" as evidence. *Id.*
3. *An action for money had and received* may be maintained where defendant has obtained money of the plaintiff which in equity and good conscience he ought not to retain; nor need he have received such money as the plaintiff's agent. *Alderson v. Ennor,* 8, 526
4. *Title to realty disputed.*—Assumpsit for money had and received will not lie for the price of sand taken and sold from a sand bar to which both plaintiff and defendant claim title. *Baker v. Howell,* 12, 73
5. *Indebitatus assumpsit* will not lie by a person claiming title against one who enters on land as a trespasser, to recover the issues and profits received by him. *Irvine v. Hanlin,* 14, 241
6. *The tort, in the conversion of ore,* may be waived, and assumpsit brought. *Randolph Co. v. Elliott,* 3, 63

ATTACHMENT.

1. *Garnishment—Uncertain interest.*—W. was garnishee in a foreign attachment against H. *Held,* it being a fair presumption from the facts that H. was equally interested with others in the contract, that there could be a recovery, without first proving his exact interest. *Weist v. Grant,* 2, 28

ATTORNEY AT LAW.

1. *Attorney and client—Purchase by the former from the latter pendente lite* can not be upheld in equity where it appears that the attorney, while negotiating for the purchase was, at the same time, and as part of the negotiation, advising his client as to the probable outcome of the litigation concerning it. *Rogers v. R. E. Lee Co.,* 2, 71
2. *To sustain a sale from client to attorney,* the burden is upon the latter, and he must show that he has protected the client's interests as he would have done in the case of his client dealing with a stranger. *Id.*
3. *Attorney purchasing from client must make full disclosure* to the latter of the names of all persons interested with him in the purchase, especially when some of the persons so interested are partners of the client in the subject-matter of the litigation. *Id.*
4. *Parties interested with the attorney in such purchase.*—If the sale is void as to the attorney, it is also void as to those interested with him as such partners. *Id.*
5. *Attorney's contract with corporation—Power of officers—Presumptions.* *Hillyer v. Overman M. Co.,* 3, 44

ATTORNEY AT LAW. *Continued.*

6. *Power of courts to pass upon authority of attorney.* *Clark v. Willett*, 4, 628
7. *Attorney's fee in an amicable partition proceeding* may be taxed as a part of the costs. *Stenger v. Edwards*, 9, 368
8. *Champerous contract not preventing recovery.*—Plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of his suit to recover certain coal mines, upon being indemnified against costs: *Held*, that the contract amounted to champerty and maintenance, but that the plaintiff was not disqualified from suing where his title was vested in him before he entered into such contract. *Hilton v. Woods*, 10, 110
9. *If the solicitor had sued in such case upon a title derived under such a contract, the bill would have been dismissed.* *Id.*

ATTORNEY IN FACT.

1. *A verbal power is sufficient to authorize an agent to sign the name of the grantor to a bill of sale, where the grantor has first agreed in person with the grantee upon the terms.* *Patterson v. Keystone M. Co.*, 13, 171
- See AGENT.

BAILEMENT.

1. *Pledge of stock held in trust—Quasi negotiability of stock.* *Thompson v. Toland*, 2, 77
2. *Sale of pledge without notice not void as to strangers.* *Id.*
3. *Bailee without hire is not liable for goods carried free, if he exercises ordinary care.* *Fay v. Steamer New World*, 2, 417
4. *Facts of the case—Gold dust.*—Where a merchant was in the habit of having gold dust carried gratuitously, the carriers refusing to carry it for hire or to become liable as common carriers, and a quantity of gold dust was stolen without their neglect or fault: *Held*, that the defendant was not liable therefor. *Id.*
5. *Bailor has ordinarily the right to ratify, and demand the proceeds of the sale if bailee sells personal property without authority.* *Atkins v. Gamble*, 13, 514
6. *General rule as to remedy of bailor for conversion.*—The owner of personal property which has been wrongfully converted, is ordinarily entitled to recover his specific property, or its value, and can not be compelled to accept other property of the same kind and equal in value in lieu of that which was converted. *Id.*

BARRIERS.

1. *Barriers not required to support canal or prevent drainage therefrom.* *Wyrley Co. v. Bradley*, 2, 89
2. *Case against lessee for removing barriers.*—Case, in the nature of waste, will lie against a lessee of a mine for an injury to the reversion by the removal of coal barriers between it and an adjoining mine, although the act complained of might also be the subject of an action for a breach of an express covenant. *Marker v. Kenrick*, 2, 93
3. *Right of action in both lessor and lessee.*—*Bannon v. Mitchell*, 2, 108

BARRIERS. Continued.

4. *Flooding from removal of barriers. Id.*
5. *Injunction, prohibitory in form, mandatory in effect to compel maintenance of barriers. Mexborough v. Bower,* 2, 92
6. *Lower mine must protect itself by barriers or otherwise; the duty of leaving barriers is not incumbent upon the upper mine. Smith v. Kenrick,* 6, 142
7. *A failure to leave barriers does not justify the owner of the upper mine in drawing foreign water into it and letting it flow upon the lower mine. Crompton v. Lea,* 6, 179
8. *Case for removing barriers; declaration looking to consequential damages upheld. Firmstone v. Wheeley,* 12, 76
9. *Relation of instroke to barriers.—When working by instroke is allowed, it is necessarily implied that barriers need not be left between the mines. Lewis v. Fothergill,* 15, 272
10. *Each owner of adjoining coal land has the right to take out all his coal, i. e., to work up to his boundary line. Jones v. Robertson,* 15, 708
11. *If the owner below would protect himself he must leave his own coal for barrier. Id.*
See DRAINAGE.

BILL OF EXCEPTIONS.

1. *When the giving or refusing of instructions is excepted to, the record should contain those given or refused. Renshaw v. Switzer,* 15, 845

BILLS AND NOTES.

- A—IN GENERAL.
- B—EXECUTION—DELIVERY—PAROL EVIDENCE.
- C—CONSIDERATION.
- D—NEGOTIABILITY.
- E—CHECKS.
- F—INDORSEMENT—ASSIGNMENT.
- G—BONA FIDE HOLDER.
- H—ACCEPTANCE.
- I—PLEADING.

A. In General.

1. *Repudiating note.*—A corporation may show, in making defense to paper issued in its name but alleged to be unauthorized, that immediately on its existence becoming known, its validity was formally repudiated. *N. Y. Iron Mine v. First Nat Bank,* 1, 458
2. *Burden to prove agency, when denied.*—In suit on bill of exchange drawn by an agent, where with the general issue defendant files affidavit denying the execution of the bill, the plaintiff has the burden of proving it drawn upon competent authority. *New York Mine v. Citizens Bank,* 2, 171
3. *Local usage can affect the general rules of mercantile and banking law only to a very limited extent, and under circumstances in*

BILLS AND NOTES—In General. *Continued.*

which the usage must be considered as made by a party a part of his contract. *Id.*

4. *A post-dated draft purporting to be payable at sight*, is for all the legal purposes of presentment, demand, protest and payment, a draft payable so long after date; but that authority to make time-paper shall be held to cover post-dated paper, their legal effect must not only be the same, but all their incidents so far identical, that both may fairly be supposed to have been in mind when the authority was given. *Id.*

5. *Peculiarities of post-dated draft—Agent's authority.* *Id.*

6. *Defense to note.*—Hearsay representations, *held*, no defense to purchase money note. *Davidson v. Jordan*, 7, 54

7. *Donee of note takes it subject to equitable defenses.* *Hicks v. Jennings*, 7, 133

8. *A bank has no right to charge a company overdraft* to the personal account of the treasurer. Nor is he liable for a draft cashed at his request, to the company, which is afterward dishonored. *Miller v. Mickel*, 15, 355

B. Execution—Delivery—Parol Evidence.

9. *Authority of agent to draw bill of exchange.* *Bank v. Hope Co.*, 1, 448

10. *Authority of agent to make notes.* *New York Mine v. Bank*, 1, 433

11. *Notes made by an agent in the name of his principal*, to his own order, suggest an interest adverse to his principal, and upon their face suggest the necessity for special caution on the part of a purchaser in demanding the authority to make them. *Id.*

12. *Payment with bill.*—The manager of a colliery having given a bill of exchange in discharge of a debt for an engine, and the bill being dishonored, the creditor, unless he has purchased the bill out and out, has a right to resort to his original cause of action, and hold the owner of the colliery therefor. *Tempest v. Ord*, 2, 117

13. *Signature to corporate note—Agent.*—Suit was brought upon the following note: "Three months after date the Ocean Mining Company promise to pay W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month." Signed, "James Harter, trustee, S. N. Stranahan." *Held*, that the note showed upon its face that it was a company obligation and binding on the company alone, and not upon Harter or Stranahan individually. *Shaver v. Ocean Co.*, 2, 130

14. *Variance.*—Under the plea of *nul debet* the note produced in evidence must agree exactly with the note sued on. *Scott v. Baker*, 2, 145

15. *Individual liability.*—A note subscribed "William Scott, President Blannerhassett Oil Co., W. H. Horner, Treasurer," is the individual note of the parties signing it. *Id.*

16. *Official signature—Intention—Name in parol contract.*—Action against James Stuart upon a promissory note signed "Jas. Stuart, Gen. Mang. and Supt. St. L. & M. M. Co." *Held*, that Stuart might show

BILLS AND NOTES—Execution, etc. Continued.

aliunde that he acted as agent, and that the consideration moved to his principal. *Held*, also, that the name of the principal need not appear in the body of a parol contract. *Gerber v. Stuart*, 2, 152

17. *Parol evidence affecting writing—Plea.*—A plea to debt upon a note, setting up the fact that the note was given for money borrowed by the maker to enable him to procure sale of plaintiff's mining property, to be repaid in case of sale, the plea not stating that such contemporaneous agreement was in writing, presents no defense. *Id.*

18. *Parol evidence admitted to explain ambiguous acceptance.* *Laftin Co. v. Sinsheimer*, 2, 167; *Schaefer v. Bidwell*, 1, 409

19. *Where the note of the mining firm is sued on*, the plaintiff must prove the authority of the agent to sign. *Skillman v. Lachman*, 11, 381

20. *Verbal agreement to vary note not permitted.* *Crater v. Binger*, 11, 488

21. *Contemporaneous parol promise to renew note* is not admissible. *Anspach v. Bast*, 12, 110

22. *Proof of authority to make note.*—Proof that a promissory note purporting to be made by a company was signed by the president and secretary is not sufficient without proof of their authority to sign it. (*Per LOTT, Senator.*) *McCullough v. Moss*, 13, 440

C. Consideration.

23. *Note reciting "contract annexed"—No contract found.*—*Held*, that the special description of the consideration for the note did not render it incumbent on the plaintiff to put in any contract or other document besides the note itself, in order to establish his case. *Fox v. Frith*, 11, 277

24. *Construction of note payable on sale of mine.* *Cheney v. Barber*, 3, 65; *Munro v. King*, 12, 160

25. *Time an essential if named in a conditional note.*—*Held*, that time was of the essence of the contract, and the face of the note was only payable if the quarry became worth the sum specified within the time specified. *Benninger v. Hanke*, 3, 18

26. *Defense to note payable out of mine.* *Anspach v. Bast*, 12, 110

D. Negotiability.

27. *Payable out of ore.*—An instrument by which a party promises to pay a certain sum at a stated time out of the net proceeds of ore to be raised and sold from a certain ore bed, is not a promissory note, it being payable upon a contingency. *Worden v. Dodge*, 2, 116

28. *Misrecital of note instead of agreement.*—Where an instrument is not strictly a promissory note, owing to uncertainty in the amount expressed to be paid, the assumption by the court in its instructions that it is a note, is not error, where the measure of recovery is the same, whether it be styled a note or an agreement to pay money. *Penniman v. Winner*, 2, 449

E. Checks.

29. *Payment in checks—Notice of dishonor.*—Plaintiff being the payee of two checks, indorsed them to the defendant company in pay-

BILLS AND NOTES—Checks. *Continued.*

ment of an assessment, representing them to be "all right," and received in return a receipt for his assessment and \$76 in money. The drawer of the larger check failed on the day of this transaction. The check was duly presented and payment refused, and a few days later defendants notified plaintiff of this fact and requested him to make the check good, which plaintiff refused to do. *Held*, that defendants would not be enjoined from collecting the assessment; *held*, also, that plaintiff was not entitled to such notice as must be given upon the dishonor of a bill of exchange; but at most to such reasonable notice as would save him from loss. *Small v. Franklin Co.*, 2, 33

F. Indorsement—Assignment.

80. *The notes of a mining company made by its agent, without authority, are void, and their assignment will not operate as an assignment of the indebtedness for which they are given.* *Carpenter v. Biggs*, 1, 407

81. *Coal sales—Notes running with the account—Discharge.*—Where a mining operator sold his coal to a dealer who, under his contract, immediately indorsed all notes received for sales to his customers, over to the operator as security, *held*, that each note so indorsed was taken as security for the whole amount of coal shipped; and that while any indebtedness existed from the dealer to the operator, payment of his note by the maker to the payee (the coal dealer) did not discharge the maker's liability thereon. *Held*, also, that the makers of the note were not discharged from liability by its presentment at bank where there were sufficient funds to meet it when due, if by mistake of the bank officers payment was refused, and the note protested for non-payment. *Hecksher v. Shoemaker*, 2, 131

82. *Request to indorse may be implied by the knowledge and acquiescence of a defendant in the indorsement of its paper by a third party, to the benefit of defendant's credit.* *Flint v. Eureka Co.*, 11, 538

G. Bona Fide Holder.

83. *Burden of proof on fraudulent note.*—In suit by the indorsee of a note which is proved to have been obtained by fraud, duress, or upon an illegal consideration, the burden of proof is upon the plaintiff to show that he is a *bona fide* holder and for value. *Perkins v. Prout*, 2, 139

H. Acceptance.

84. *President held personally liable upon the following form of signature: "Accepted Sept. 14, 1846, John R. Livingston, Jr., President Rosendale M'ng Co., 16 Wall St."* *Moss v. Livingston*, 2, 119; *Scott v. Baker*, 2, 145

85. *Acceptance—Want of authority—Personal liability.*—A bill of exchange, directed to the defendant thus: "To J. D., Purser, West Downs Mining Company," was accepted by him in these terms: "J. D., accepted per proc. West Downs Mining Company." J. D. was a member of the company, but was not authorized to accept bills on their behalf. *Held*, that he was personally liable. *Nicholls v. Diamond*, 2, 121

BILLS AND NOTES—Acceptance. Continued.

86. *Acceptor held personally.*—An order to pay to the drawer's order at a time certain after date, a sum of money for "value received in machinery supplied the adventurers in Hayter & Holme Moor mines" was directed to the defendant, who wrote upon it "Accepted for the company, W. C., Purser." *Held*, that the defendant was personally liable as acceptor. *Mare v. Charles*, 2, 124

87. *Personal acceptance.*—A draft drawn upon one as treasurer of a mining company but accepted in his individual name, may be treated as his personal contract. *Lallerstedt v. Griffin*, 2, 128

88. *Contract of indemnity for accepting drafts—Defense.*—In an action against the officers of the corporation by one who has accepted and paid drafts under a contract that the corporation would indemnify him, it is no defense that the drafts were not those of the corporation but of one Cook, its treasurer. *Byers v. Franklin Co.*, 12, 28

I. Pleading.

89. *Variance.*—A variance between a note and the allegations descriptive thereof may be taken advantage of under the plea of *non est factum*; but in declaring upon a note signed by two parties, it is no variance to aver that the defendants—the said *Abram D. Bevan*, by the name and style of *A. D. Bevan*—made their certain writing obligatory, the words in italics being read as if in parentheses. *Peddie v. Donnelly*, 2, 157

BLASTING.

1. *Negligence immaterial where the act is unlawful.* *Wright v. Compton*, 2, 189

2. *"Reputation" of powder.*—A question concerning the reputation of a certain powder as a safe or dangerous blasting compound, is incompetent when the issue is as to the safety of the powder; but the opinion of a witness as to its safety, based upon his personal experience with the powder, is proper. *Sowden v. Idaho Co.*, 2, 199

3. *A mine owner can not be restrained from blasting in the night time*, as is usual in the mines, although it disturbs the sleep and thus affects the health of the owner of the surface and his family, or diminishes the value of his estate. *Marvin v. Brewster M. Co.*, 13, 40

BONA FIDE PURCHASER.

1. *Payment before notice—Payment after notice.*—No one is protected as a *bona fide* purchaser who has not made payment before notice. It is not enough that he purchases without notice, if he pays after notice. *Palmer v. Williams*, 14, 580

BOND.

1. *Title bond, giving option, construed as "nudum pactum."* *Gordon v. Darnell*, 2, 221

2. *Void for want of consideration.*—A bill for specific performance was brought, based upon a title bond by which the obligors bound themselves to convey the "Terrible Mine" to the obligees upon certain pay.

BOND. *Continued.*

ments being made. *Held*, that the bond was without consideration and therefore without validity. *Smith v. Reynolds*, 2, 227

8. *Want of certainty cured by verdict in suit on bond.* *Gear v. Shaw*, 7, 643

BOUNDARIES.

1. *Boundaries must be marked and can not be changed.*—Before the passage of the U. S. acts now in force, the staking of the boundaries of lode claims was not customary, but under those acts it is essential; and when the boundaries are so defined, they can not be changed to the injury of any intervening locator. *Golden Fleece Co. v. Cable Co.*, 1, 120

2. *Chancery may entertain a bill to settle boundaries between coal mines*, after a recovery in ejectment, but will not order an account in such case in favor of the party out of possession. *Sayer v. Pierce*, 1, 73

3. *Boundaries controlled by plat.* *Lampe v. Kennedy*, 2, 266

4. *Fence called for, not necessarily a line fence.*—The deed under which defendants claim requires the south line of their lot (the line here in dispute) to be so run as to leave standing a certain fence on plaintiff's lot. *Held*, that this does not purport to make such fence the south boundary of defendant's land; and that G. had no authority to change, by his deed, the boundaries fixed by the plat. *Id.*

5. *Negligence in ascertaining boundary.*—Defendants who have the means of ascertaining the exact boundaries of their mining claim, and who work across such boundaries in ignorance of their location, are guilty of negligence. *Maye v. Yappen*, 10, 101

6. *Proof of corporate knowledge of boundaries.* *Franklin Co. v. McMillan*, 10, 224

7. *Surveyor's notes of processioners—Evidence excluded.*—The testimony of a witness taken down by a surveyor while making a survey and returned in his book of explanation, was not allowed to be read in evidence, though the witness was shown to be seventy-five years of age and in feeble health. *Id.*

8. *A traditional survey*, agreed at one time to have been made, and supposed to have been at that time made, but never satisfactorily proved and a subject of continued contention, can not be treated by courts as binding upon the parties, although they have attempted to fix it by subsequent survey. *Blewett v. Coleman*, 11, 120

9. *Infant consenting to boundaries.*—If consentable lines are fairly made between adjoining tracts by a guardian on behalf of an infant and an adult, the latter, or those claiming under him, can not object on the ground of the infancy; and it seems that if the infant does not dissent when he becomes of age, but acquiesces, he is forever bound. *Brown v. Caldwell*, 12, 674

10. *Lode claim 1,763 feet long held void.*—Boundaries of mining claims must be definite and readily traced, and within the limit authorized by law; boundaries beyond the maximum limit import no notice, and are equivalent to no boundaries at all. *Leggatt v. Stewart*, 15, 358

BOUNDARIES. *Continued.*

11. *Courses and distances*, under the authorities, are assigned the lowest place in the scale of evidence, as being the least reliable. And it is not necessary that the monuments to control be unquestionable. *Cullacott v. Cash Co.*, 15, 392

12. *Monuments control course and distance—Variance in the calls.*—The courses and distances of a survey must yield to its monuments, whether natural or artificial. While a stump, hewed and marked, might be adopted as a location post, the descriptive survey should give both its real and assigned character. When the call in a location certificate is for a post, parol testimony is inadmissible to show that while a post is called for, a stump was in fact established as a corner. *Pollard v. Shively*, 2, 229

13. *Keeping up monuments—When necessary.* *Id.*

14. *Fixed objects control.*—Where boundaries are given with reference to fixed and known objects, they control courses and distances. *Kamphouse v. Gaffner*, 2, 257

15. *Parol evidence to explain ambiguities—Monuments.*—The general rule that parol evidence can not be admitted to contradict or control the language of a deed, but the latent ambiguities may be explained by such evidence, *held*, applicable to a location certificate. The rule is that where monuments are relied upon to control courses and distances, they must be found as called for. *Pollard v. Shively*, 2, 229

16. *Mistake—Estoppel—Subsequent purchasers.*—A disputed boundary line between the claims of two mining companies was finally fixed by mutual consent, and the property passed to subsequent purchasers; it was then discovered that the settlement was based upon a mutual mistake as to the true course of the line, but the purchases had been made with a view to the compromise line. *Held*, that the parties were estopped from disputing the correctness of the compromise line. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. *McGee v. Stone*, 2, 238

17. *Fixing bounds by proof of neighboring lines.* *Stoakes v. Monroe*, 2, 240

18. *Evidence.*—Where premises occupied by certain persons are referred to in a lease as a boundary of the premises leased, it is proper to admit evidence showing the location of premises so referred to, for the purpose of explaining the circumstances under which the lease was made, or of applying it to its proper subject-matter, or of raising and explaining a latent ambiguity. *Kamphouse v. Gaffner*, 2, 257

19. *Side line posts.*—Posts placed opposite the discovery shaft, 600 feet from one end and 900 feet from the other end of the claim, is a substantial compliance with the requirement of the statute that the side posts be placed in the center of the claim—as with the corner posts properly located the boundaries of the claim, with side posts so placed, can be “readily traced” by them. *Pollard v. Shively*, 2, 229

20. *Corporation not bound to line assented to by its superintendent.* *Overman Co. v. American Co.*, 2, 251

21. *Boundaries must be marked.*—It is an imperative requirement

BOUNDARIES. *Continued.*

of the law, and indispensable to a valid location, that it shall be "distinctly marked on the ground, so that its boundaries can be readily traced." *Gleeson v. Martin White M. Co.*, 9, 429

22. *Setting stakes at the four corners* is a sufficient marking. *Id.*

23. *Exactness in setting stakes is not required of the locator.*—The difference of a few feet between the location stakes and the stakes set on survey for patent, is immaterial. *Eilers v. Boatman*, 15, 462

24. *Description—Ambiguity.*—A contract to convey land, bounded on the south by a line ten paces north of certain quarries, the face of the quarries being irregular, but having a general east and west course, *held*, to mean a straight line from a point ten paces north of the east, to a point ten paces north of the west, extremity of the quarries. *Huffman v. Hummer*, 2, 242

25. *Boundary along a meandering stream.* *Quicksilver Co. v. Hicks*, 11, 98

BRICK.

1. *Brick kiln not included in deed.*—Movables, such as brick in a kiln, do not pass in a deed of conveyance unless specially mentioned. *East v. Ealer*, 2, 274

2. *Brick contract—Title in owner of clay—Dealing with the maker.*—One Ultzman made brick on the land of plaintiff under contract by which no title to the brick was to pass until plaintiff was paid for his clay and his wood used in the manufacture. Ultzman sold a lot of these bricks to defendant, who supposed he was buying Ultzman's property, and in payment he applied a set-off which he had against Ultzman. *Held*, 1. That the contract was not within the statute of frauds. 2. That the apprehension of the defendant that he was buying from Ultzman, not having been induced by Ultzman, did not prevent recovery in the name of the real owner. *Brown v. Morris*, 8, 177

3. *Variance in number.*—Where the complaint avers delivery of 41,000 brick, and the proof shows delivery and acceptance of 41,328 brick, it is an immaterial variance and the verdict will stand for compensation for the full number. *Id.*

BROKER.

1. *Measure of damages against principal* refusing to pay broker the price of stock bought for plaintiff on his order. *Giddings v. Sears*, 2, 281

2. *Bound by first charge.*—An agent for selling coal lands presented bill for \$1,000 services. Judgment for larger sum set aside on the ground that the bill fixed the value. *Daniels v. Wilbur*, 2, 233

3. *Usage to pay on delivery.*—A receipt is only *prima facie* evidence of the payment of money; and a contract made in the Board of Brokers in San Francisco, acknowledging the receipt of money, having been delivered before the money was paid, it is competent to prove the habitual course of dealing among members of the board in like transactions, in order to account for the mistake. *Winans v. Hassey*, 2, 284

4. *Commissions.*—Evidence that certain large sales of coal could only have been made through the particular brokers employed, *held*,

BROKER. Continued.

to be competent upon suit to recover back commissions. *Carter v. Philadelphia Co.*, 2, 287

5. *Broker's contract*.—An ordinary broker's contract, for the buying of stock each share of which has a distinct and independent value, can not be regarded as entire. *Marye v. Strouse*, 2, 294

6. *Custom—Broker's charges*.—A custom among mining brokers of charging each customer the full price of a telegram upon the receipt of a dispatch containing several orders, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it. *Id.*

7. *Broker's license*.—One who brings an action to recover compensation for procuring a sale of coal lands under a special contract, need not show that he had a license to act as a real estate broker. *Shepler v. Scott*, 2, 674

8. *Liability to broker for purchased stock—Readiness to deliver*.—Seal, a broker, bought stock on the order of Wynkoop, paid for it and informed him of the purchase. The stock was delivered to Seal; he frequently asked Wynkoop to take the stock, and although there might have been times when no stock was in his name, he could at any time have delivered it to Wynkoop, who never requested a delivery. Held, that Seal could recover for the money advanced, and that Wynkoop was estopped from alleging that Seal could not comply, never having offered payment or demanded delivery, and Seal being ready to deliver at the time of trial. *Wynkoop v. Seal*, 13, 493

9. *Idem—Temporary transfer of the stock by the broker*.—It was not error to refuse to charge that plaintiff could not recover because at some intermediate time the broker had not the stock standing in his name or had temporarily hypothecated it. *Id.*

10. *Broker's liability for stolen stock sold on commission*. *Ber-cich v. Marye*, 13, 544

CERTIORARI.

1. *Extent of judgment upon certiorari under statute*. *Miller v. Sparks*, 6, 232

2. *Certiorari to commissioners*.—If a person against whom an assessment is made make an affidavit before the commissioners of appeal to what he believes to be the true value, and the commissioners refuse to make a corresponding reduction, relief can be obtained in this court by *certiorari*. *State v. Randolph Township*, 14, 108

CLAIM.

1. *A claim of water merely for speculation, and not intended for any useful purpose, is invalid*. *Weaver v. Eureka Co.*, 1, 642

2. *Claim, how lost*.—The right to a mining claim acquired by appropriation and occupancy may be lost: 1. By forfeiture under the district rules. 2. Where no district rules exist, by failure to work the claim with reasonable diligence. 3. By abandonment. *Mallett v. Uncle Sam Co.*, 1, 17

3. *Mining claim may be sold on execution*.—The interest of a miner in his mining claim is property, and is liable to seizure and sale under execution. *McKeon v. Bisbee*, 2, 309

CLAIM. *Continued.*

4. *Right of entry on mineral lands.* *Gillan v. Hutchinson*, 2, 317
5. *A mining claim has a legal money value* of such a nature as to be estimated and to allow of appeal to this court, as in other cases where "the value of the property in dispute" must exceed \$2,000, as the basis of jurisdiction. *Sparrow v. Strong*, 2, 320
6. *National recognition.*—Such claim may be a right acquired under the Mexican government; is recognized by territorial authority, and in any event has received national sanction by the acquiescence of the government in its acquirement. *Id.*
7. *Tenure of mineral lands.*—A statute of Cal., Pr. Act, § 380, provides in substance that any controversy which might be the subject of a civil action, may be submitted to arbitration "except a question of title to real property in fee or for life." *Held*, that under this statute an action for the recovery of mining ground on the public domain could not be submitted to arbitration. *Spencer v. Winselman*, 2, 324
8. *Mining claims, real estate.*—Mining claims are real property and pass by deed. *Houtz v. Gisborn*, 2, 340
9. *A claim is a title.*—Claims located on the public lands are recognized, practically, as titles; recognized by courts as legal estates of freehold, except as to doctrine of abandonment. *Merritt v. Judd*, 6, 63
10. *Status of possessory claims.*—The appropriation of the public mineral lands and development of the same under the license and acquiescence of the Federal and State governments considered as fixing the status of mining interests in California. *Merced M. Co. v. Fremont*, 7, 313
11. *"Mining claim" defined.*—*Mount Diablo Co. v. Callison*, 9, 616
12. *No presumption of uniformity in size of claims.* *Live Yankee Co. v. Oregon Co.*, 12, 94
13. *Mining claims are treated as real estate* although the title be held under conditions, and as such, are conveyed by deed, are sold on execution, and descend to the heir. *Harris v. Equator Co.*, 12, 178
14. *Vested rights of mining claimants.*—Persons claiming and in the possession of, mining claims upon the public lands of the United States, are as between themselves, and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation. *Hughes v. Devlin*, 12, 241
15. *Possessory "claims" are personal property*, do not rank above estates for years, and contracts relating to them are therefore within the power of an administrator. *Stewart v. Chadwick*, 13, 236
16. *A "claim" personalty—Sale of administrator.*—A "miner's claim" being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator. *Corbett v. Berryhill*, 14, 671

See MINING CLAIM.

CHANGE OF VENUE.

1. *Wrong place of trial, how remedied.*—District courts are courts of general jurisdiction, and the right to have a cause tried in particu-

CHANGE OF VENUE. *Continued.*

lar counties is a personal privilege, which is waived if not claimed at the proper time and in the proper manner. If suit is brought in the wrong county the proper remedy is by motion for a change of venue, and not by demurrer. *Watts v. White*, 13, 11

2. *The application, on account of the prejudice of the judge*, need not be in the form of a petition. It may be allowed upon affidavit. *Risto v. Harris*, 15, 53

COAL.

1. *Sale, by shipper, conditioned on receipts from mines*.—A contract by vendor to ship coal as soon as it is received from the mines, with a proviso that the contract is not to bind if the coal company fail to deliver it to the vendor according to special arrangement recited, calling for *immediate delivery*, is a conditional contract. The coal company failing to deliver to the vendor, vendor is not bound to ship. *Neldon v. Smith*, 2, 370

2. *Subsequent receipts of shipper—Option*.—If coal is received from the mines after the time named in the contract with the coal company, and intended in the contract between the parties, the seller is not bound to deliver it, nor is the buyer bound to receive it. The buyer has not an option to take it for the price named in the contract. *Id.*

3. *Vendor and purchaser—Coal on wharf*.—Where the owner of coal lying on the wharf orders the wharfinger to deliver it to a purchaser, and the wharfinger agrees to deliver upon the purchaser paying the wharfage, the delivery is complete, so far as an execution creditor of the vendor is concerned. *Boswell v. Green*, 2, 363

4. *Breach of contract—Waiver*.—In suit upon a coal contract for damages on account of the inferior quality of the coal delivered, and the failure to deliver within the time named in the contract, the defendants insisted that both claims were waived; the evidence was conflicting. *Held*, that the question of waiver was properly left to the jury. *Merrimack Co. v. Quintard*, 2, 346

5. *Sale of coal "found."* *Jewett v. Spencer*, 2, 499

6. *The words "screened coal" construed*. *Mercer M. Co. v. McKee's Adm'r*, 5, 531

7. *Screened coal, nut coal and slack, defined*. *Williams v. Summers*, 15, 246

8. *Coal "won."*—It seems that coal is "won" when it is put in a state in which continuous working can be forwarded in the ordinary way, but not when water is reached simultaneously with the coal, so as to necessitate stoppage to provide sufficient means of drainage. *Lewis v. Fothergill*, 15, 272

COLLIERY.

1. *Contract between mining company and transporting company construed*. *Hazleton Co. v. Buck Mt. Co.*, 2, 389

2. *Sale of colliery—Parol evidence*.—In an action on a contract for the sale of a colliery for a gross sum of money, to be paid at a certain rate per ton on the first coal mined therefrom, until the full consideration was paid, parol evidence is admissible to prove that at the time of the

COLLIERY. *Continued.*

execution of the contract it was agreed between the parties that the vendees should not be bound to mine the necessary amount of coal, and that the vendor should take the risk of their doing so; the English rule that parol evidence is inadmissible to vary the legal operation of an instrument does not obtain in Pennsylvania. *Chalfant v. Williams*, 2, 548

8. *Benefit of working shaft confined to lands of party sinking it.*—(Where the sinking of the shaft was parcel of the consideration of a sale and had relation to other lands of the vendor.) *Leavers v. Cleary*, 2, 618

4. *Colliery, a trading concern.*—A colliery is not only an enjoyment of the estate, but, in part, carrying on a trade. *Dudley v. Warde*, 6, 34; *Wren v. Kirton*, 2, 408; *Williams v. Attenborough*, 2, 410

5. *Custom as to coal pillars controlled by special contract.* *Randolph v. Halden*, 9, 29

6. *Appurtenances to coal bank.*—The lease of a coal bank will carry with it the drifts, platforms and hoppers used in working it, as appurtenant, but the principal thing granted is the right to mine coal, and not the drift or passage leading into the mine. *Tiley v. Moyers*, 15, 259

COMMON LAW.

1. *The common law adapts itself to the circumstances and necessities of the community.* *Hale Co. v. Storey County*, 14, 115

COMMON CARRIER.

1. *Liability for refusal to carry.*—Whether a common carrier of goods and passengers merely can be made liable in an action for refusing to carry gold dust, query? *Fay v. Steamer New World*, 2, 417

2. *Negligent unloading of coal.*—A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road. It is bound also to unload them with due care. *Rice v. Boston R. R.*, 2, 419

8. *Construction of special contract between pipe line and railroad company.* *Oil Creek Co. v. Penna. Co.*, 2, 421

CONDITION.

1. *Condition subsequent—Failure to perform forfeits estate.* *Adams v. Ore Knob Co.*, 3, 183

2. *Breach of condition—Re-entry.*—In such a case, when the grantors remained in possession of the premises, upon the breach of the condition they became revested with the estate conveyed, unless they waived the forfeiture, and there was no need of a clause reserving the right of re-entry for the breach. *Id.*

3. *Waiver of breach.*—Mere silent acquiescence in an act which had constituted a breach of an express condition would not amount to a waiver of the right of forfeiture for such breach. *Id.*

4. *Conditional purchase of mine—Forfeiture.* *Gordon v. Swan*, 3, 84

5. *Covenants construed as conditions.*—The right of re-entry being attached to covenants, gives them the force of conditions. *Chamberlain v. Parker*, 10, 145

6. *Pleading conditions performed.*—The general allegation that

CONDITION. Continued.

plaintiff has performed all and singular his agreement and covenants with defendant is a sufficient averment of the performance of conditions precedent. *Moritz v. Lavelle*, 16, 236

CONFUSION.

1. *Agent confounding his principal's property with his own*, charged with the whole, except what he can prove to be his own. *Lupton v. White*, 2, 430

2. *Directions to master*.—The court refused, in such a case, a prospective direction to admit books not legal evidence, usual in a fair case, as where from want of notice of an adverse claim, a strict account can not be given, merely giving liberty to apply upon any question of evidence. *Id.*

3. *Conversion by mixing, melting and manufacturing*. *Redington v. Chase*, 2, 439

4. *Preventing admeasurement of damages*.—If a party entitled under a contract to receive a profit from another, by his own act, so confound the measure of that which he was to receive that it can no longer be ascertained, he vacates his whole claim. *Pringle v. Taylor*, 2, 458

5. *Burden of proof rests upon the party causing the mixture*. *Butte Canal & D. Co. v. Vaughn*, 4, 552

6. *Mixture of coals by the licensee's own act*.—He was not entitled to an inquiry as to how much the selling price was affected by the mixture. *Rokeby v. Elliot*, 8, 651

7. *Interest*.—Held, that interest at five and not at four per cent ought to be allowed on the expenses of winning. *Id.*

CONSIDERATION.

1. *Failure of oil well*.—The fact that an oil well sold, fails to produce enough to justify working it, is not a failure of consideration. *Penniman v. Winner*, 2, 449

2. *Construction of lease with regard to implied benefits to result to that part of the lode not demised*. *Townsend v. Peasley*, 2, 612

3. *Consideration of facts construed to amount to consideration for a promissory note*. *Savage v. Ball*, 2, 579

4. *Want of mutuality is no defense except in cases of executory contracts*. *Grove v. Hodges*, 2, 699

5. *Inadequacy of consideration without fraud*.—Gross misconception of the value of a purchase is not sufficient to set the purchase aside, where the means of ascertaining the value are left open to the vendee, and there has been no deception practiced by the vendor. *Warner v. Daniels*, 6, 436

6. *The "prospect," the inducement of purchase*.—Mines are bought and sold on the "prospect," not on the warranty. *Tuck v. Downing*, 7, 84

7. *Release of uncollectible claim, no consideration*.—The release of a claim for damages upon alleged breach of an unlawful covenant, reserved against a coal lessee, is not a valid consideration for a new contract. *Crawford v. Wick*, 8, 542

8. *Extrinsic consideration*.—A consideration may be shown by evidence, extrinsic to the terms of the contract. *Hurd v. Gill* 9, 306

CONSIDERATION. *Continued.*

9. *Fraud that impeaches the consideration of a promissory note constitutes a defense to an action at law on the note.* *First Nat. Bank v. How*, 12, 184
10. *Failure or want of consideration must be specially pleaded in an action on a promissory note.* *Munro v. King*, 12, 160
11. *Consideration in prospecting lease—Warranty.*—Under a prospecting lease wherein the lessee agrees to pay a royalty or a fixed sum to be allowed as advance royalty, there is no implied warranty that the coal sought for when found shall be "good, marketable, merchantable coal." The consideration will be applied as for the use of the land. *Fort Scott Co. v. Sweeney*, 12, 166
12. *Consideration payable out of mine.* *Ray v. Hodge*, 15, 371
13. *Obligation in such case to work the claim.* *Id.*
14. *Mutuality is essential to a contract;* if no basis appears upon which one who has taken a lease can charge others with its obligations, the latter can not charge him with having taken it in the common interest and claim rights under it. *Pierce v. Pierce*, 15, 675
15. *The real consideration for a contract may be shown, although the contract states only a nominal one.* *Waterman v. Waterman*, 15, 687
16. *Adequacy of consideration for a mining venture.*—Where a party advances money to develop certain mines, for which he is to be repaid out of their first product, and receive in addition an undivided fractional part of the mines: *Held*, that the contract can not be avoided on the ground that the consideration was inadequate. *Id.*
17. *Idem.*—On the same state of facts *Held*, that the contract can not be avoided on the ground that the property to be conveyed is uncertain, or that the performance of the contract would work hardship. *Id.*

CONSPIRACY.

1. *Acts of conspirators.*—There was evidence that B. & S. acted in concert and made false statements in procuring the subscription of M. and others. Evidence of the acts and declarations of B. & S. or either of them, either in the presence or absence of M., if tending to throw light on the transaction or corroborate testimony already in, was admissible. *McCabe v. Burns*, 6, 685
2. *Act of one binds all.* *Page v. Parker*, 6, 544
3. *Evidence against one conspirator tells against the other, there being evidence that the purchase and sale of land was the combined act of two parties.* *Simons v. Vulcan Oil Co.*, 6, 653

CONSTITUTION.

1. *Declaratory laws, as such, are unconstitutional.* *Union Iron Co. v. Pierce*, 12, 20

CONTEMPT.

1. *Proceeding in contempt to protect private rights.*—Where the proceeding by attachment for contempt is in substance to secure the rights of the party injured (as in case of defendants continuing to mine while under injunction), the court regards the substance and not the form, and will issue mandamus to compel the court below to inquire into the acts charged. *Merced M. Co. v. Fremont*, 7, 309

CONTEMPT. *Continued.*

2. *Proceedings in contempt are in their nature criminal. Vanzandt v. Argentine M. Co.,* 7, 684
3. *Proceedings in contempt are affected by the invalidity of the original orders. Brennan v. Gaston,* 7, 426
4. *Injunction modified.—What not a contempt.*—When an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond, *held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. *Fremont v. Merced M. Co.,* 9, 659

CONTINUANCE.

1. *Continuance (on discretionary grounds) not the subject of exception. Gear v. Shaw,* 7, 648
2. *Affidavit for continuance used upon trial.*—An affidavit for continuance is not to be treated by the court as a part of the record, and can only be used upon the trial, if at all, when introduced by one of the parties for some legitimate purpose. *Campbell v. Rankin,* 12, 257

CONTRACT.

A—PARTIES.

B—EXECUTION—DELIVERY.

C—CONSIDERATION.

D—CONSTRUCTION.

E—PERFORMANCE—ENFORCEMENT—CONDITION.

F—ABANDONMENT—RESCISSION—SURVIVAL—ESTOPPEL.

G—PUBLIC POLICY.

H—EVIDENCE.

I—RATIFICATION.

J—MEASURE OF DAMAGES.

K—MISCELLANEOUS.

A. Parties.

1. *Married woman's contract void. Shaver v. Bear River Co.,* 2, 538
2. *Quartz mill subscription.*—Certain persons subscribed money to build a quartz mill, in which all the subscribers were to be interested, and the money was to be paid in such manner and at such times as the majority of the subscribers might order. *Held*, to be a subscription only for the mutual benefit of all the subscribers. *Wheeler v. Floral Co.,* 2, 622
3. *Mutuality in subscription* and compliance with its terms are necessary to its recovery. *Id.*
4. *Liability to assignee.*—This liability of the principal is the same to the assignee of the demand, even if the assignee had notice before the goods were sold that the agency had ceased. *Van Dusen v. Star Quartz Co.,* 3, 26
5. *The situation of contracting parties at the time of contracting* may be considered in interpreting their acts. *Creighton v. Vanderlip,* 7, 172

CONTRACT—Continued.

B. Execution—Delivery.

6. *Words below signature.*—Words added to a contract, following the signatures, may be shown by parol evidence to form parcel of the contract. *Verzan v. McGregor*, 2, 565
7. *A contract for the future delivery of ore vests no title in the ore in the vendee until it is set apart.* *Randolph Iron Co. v. Elliott*, 3, 63
8. *Merger of prior and contemporaneous agreements in written contracts.* *Bragg v. Geddes*, 5, 624
9. *One contract on two pieces of paper—Stamp.* *Bowker v. Goodwin*, 10, 149
10. *Executory agreement treated as executed.*—An agreement, executory in terms, to transfer chattel property, accompanied, however, by the actual transfer, will be treated as a bill of sale, i.e., as an executed contract. *Johnston v. Mendenhall*, 15, 101

C. Consideration.

11. *Subscription contract.*—A subscription paper signed with the number and amounts of shares attached to the signatures, is in effect a promise by each to pay the others; the promises are a sufficient consideration, one for the other, and the parties are sufficiently definite. *Kimmins v. Wilson*, 2, 159
12. *Note for subscription. Id.*
13. *The legal obligation to pay the price is a good consideration for the sale of goods.* *Boswell v. Green*, 2, 363
14. *Subscription for lease.*—A subscription paper called for a lease of oil land as soon as 25 shares of \$100 each were paid. This amount being paid, there was tendered a lease reserving one fifth royalty and also surface rights. *Held*, that the \$2,500 was the sole consideration and that the subscribers were entitled to a lease clear of royalty and reservations. *Reddington v. Henry*, 3, 31
15. *Mutuality of contract.*—The contract must require definitely something from each contractor or it holds neither. *Davis v. Flagstaff M. Co.*, 2, 660
16. *Want of privity.*—E. gave indemnity to H. against damages to C. for failing to fulfill his contract. *Held*, that this created no liability on E. to C. on account of H.'s contract. The indemnity created no privity between E. and C. *Grubb's Appeal*, 3, 416
17. *Want of privity.*—If A purchase ore of B, and C, without the knowledge or consent of A, delivers his ore in fulfillment of the contract of B, the relation of vendor and purchaser does not exist between A and C. *Randolph Iron Co. v. Elliott*, 3, 63
18. *Owner—Contractor and workman—Implied acceptance.*—An owner, who was having a shaft sunk by contract, and who kept the time books and paid off the contractor's men, paid the plaintiff, one of the workmen, about half his claim, and at the same time wrote him out an order on himself for the balance, which order he gave to the plaintiff to have signed by the contractor. The order was not signed for six weeks. The owner had meanwhile paid off the contractor. *Held*, that he was liable on the order, and should have re-

CONTRACT—Consideration. *Continued.*

tained sufficient to pay it on his settlement with the contractor.

Lumaghi v. Neuber, 3, 125

19. *Contract to pay in water or cash at option of payer.*—*Held*, that if they elected to pay such two-thirds in cash it did not become due in installments, like the one third, but upon the completion of the ditch. *Myers v. South Feather River Co.*, 4, 566

20. *Idem.*—The payments in water could not be claimed before the ditch was completed, and the cash can not be required sooner. *Id.*

D. Construction.

21. *Contract between a coal company and a city delivery teamster construed as binding for a year and no defense that the company had discontinued all local deliveries by selling all its output at the pit's mouth.* *Boulder Valley Co. v. Tierney*, 2, 881

22. *Incidental terms implied.*—As to that which is not expressed in a contract but must be implied, such as the time, manner and quantity of coal delivered, the law fixes a reasonable measure of performance which is to be regulated by the usual course of business. *Hazleton Co. v. Buck Mt. Co.*, 2, 889

23. *Quantity to be carried.*—The plaintiffs while pursuing their mining operations in a reasonable and proper manner, were entitled to transportation for all the coal they mined and offered. *Id.*

24. *Abrogation of mutual contracts.*—In mutual contracts one part is not to be abrogated or impaired by another, when that has an appropriate meaning which satisfies the words. Examination and construction of a contract with mutual covenants for furnishing and transporting coal. *Id.*

25. *Election as to amount to be delivered.* *White v. Toncray*, 2, 463

26. *Coal lease—"Fairly wrought" construed.* *Griffiths v. Rigby*, 2, 528

27. *Ore contract with furnace, construed.* *Chapman v. Briggs Co.*, 2, 524

28. *A sale of barytes implies a merchantable article.* *Fitch v. Archibald*, 2, 555

29. *Option—Time.*—M. contracted for the purchase of iron manufactured by the C. I. Works, but reserved the right to reject all white and mottled iron in excess of ten per cent. of the quantity of gray mill iron. *Held*, that such an option must be exercised within a reasonable time or the right be lost; and that a complaint as to the quality of the iron made nearly a year after M. had full opportunity to examine the iron, and after it had been weighed and paid for and M. had assumed control of it, was not within a reasonable time. *Carondelet Iron Works v. Moore*, 2, 623

30. *Construction of parties followed by courts.*—The construction given to a contract by the parties themselves, as shown by their acts under it, may be resorted to in determining the original intent at the time the contract was executed. *Leavers v. Cleary*, 2, 618

31. *Construction of contract for exchange of stone between quarries.* *Wheeler v. Johnson*, 2, 642

32. *The fact that a sale is of several parcels of land, with a partic-*

CONTRACT—Construction. *Continued.*

ular price apportioned to each, does not make the contract necessarily severable. *Graver v. Scott*, 2, 644

33. *Deferred payments*.—Where, by the terms of a contract, certain payments are deferred, such payments become due by operation of law whenever defendant commits a breach of the contract, such as prevents the completion of the work. *Monroe v. Northern Pacific Co.*, 2, 652

34. *Indivisible contract—Amount recovered*.—If plaintiffs were ready at all times to deliver the ore according to contract, and defendant failed to comply with its provisions, they would be entitled to recover the contract price for all ores delivered. But if defendant was ready and willing to receive the full 1,000 tons, in lots of 100 tons, as provided in the contract, but plaintiffs, notwithstanding the capacity of the mines enabled them to do so, refused to deliver the ore, they could only recover for each 100 tons indivisible, and would be liable for damages for breach of contract. *Kennedy v. Schwartz*, 2, 679

35. *Tube well drilling, a service of personal skill*. *Green v. Gilbert*, 2, 694

36. *Construction—Covenant by lessee to purchase—Evidence*.—An agreement indorsed on a mining lease that "the parties of the second part shall, at the expiration of two years from the date hereof, pay unto the said B. the sum of \$10,000, in lieu of the ten per cent. agreed upon in said lease, then the said B. shall make a good and lawful deed of conveyance for the above described premises in the within lease," construed to be upon its face an absolute contract by the lessee to pay and purchase at the end of two years, and in the absence of fraud or misrepresentation, it was held, that parol evidence was inadmissible to explain it. *Suffern v. Butler*, 3, 23

37. *Construction of contract to extinguish squatters' claims*. *Pease v. Brown*, 3, 46

38. *Payment dependent on condition of mine—"A good gold mine."* *Richards v. Schlegelmich*, 3, 78

39. *Charcoal contract—Dependent covenants*.—The stipulations contained in contract in these words: "A B contracts with C D to furnish at Long Creek Furnace from 500 to 1,000 bushels of coal daily at 6½ cents per bushel; C D to furnish the timber *gratis*, and advance to A B all the money, weekly, necessary to pay off the wood choppers," are dependent, and if without fault on the part of the owner of the furnace, and without legal excuse, the quantity of coal agreed for is not delivered, the owner of the furnace may properly set up such failure by way of counter claim to an action for the price of the coal. *Burton v. Wilkes*, 3, 88

40. *Oil contracts—Evidence of entirety*.—Defendants bought 4,000 barrels of oil from plaintiff, and eight similar papers the same day were executed by them, each calling for the delivery of 500 barrels on the last day of certain consecutive months, payment to be made on each delivery. Held, that there were several contracts, and parol evidence was inadmissible to show that at the time of the purchase it was agreed that it was an entire contract, and that the several papers

CONTRACT—Construction. *Continued.*

were executed with that understanding and according to the custom of the trade. *Morgan v. McKee*, 3, 123

41. *Severable contract*.—The K. Coal Co. agreed to deliver 50,000 tons of coal within a year at the rate of 6,000 tons monthly at the option of S., who was to give notice by the 25th of each month of the amount required for the succeeding month. *Held*, to be a severable contract. *Scott v. Kittanning Co.*, 3, 159

42. *Marble quarry and mill contract construed*.—The contract in this case *held*, not to prevent the working of the quarry *ad libitum* for the benefit of the owners, nor does it leave in the grantor a corporeal interest in the marble *in situ*. *Rutland Marble Co. v. Ripley*, 3, 291

43. *Contract not running with land*.—C., one partner, contracted to sell ore from the common property to H., for a particular furnace, to be paid for in iron from that furnace, E., the other party, declining to join. E. and P. afterward bought H.'s furnace, so that he could not furnish iron. *Held*, that the contract with H. did not run with the land, and E., after the purchase, was not responsible to C. on the contract. *Grubb's Appeal*, 3, 416

44. "*Well and faithfully perform*."—A contract guaranteeing the faithful performance of a contract is not a mere guaranty of the skill and fidelity of the principal. *Janes v. Scott*, 7, 181

45. *The construction of written contracts* is not to be submitted to the jury. *Emery v. Owings*, 8, 878

46. *Whether words are used in a local or in a general sense* is a question for the jury. *Clayton v. Gregson*, 9, 141

47. *Entire contract*.—Full performance of a contract entire in its nature, is a condition precedent to the right to recover for services thereunder. *Isaacs v. McAndrew*, 9, 690

48. *Rule of construction*.—In interpreting agreements it is an elementary rule to construe the clauses together, giving to each the sense which results from the whole instrument. *Escoubas v. Louisiana Co.*, 12, 343

49. *In mora*.—Parties are put *in mora* by a demand that they do that which in a legal sense they ought to do, and can do. *Id.*

50. *Where the words are clear*, there is no room for construction. *Benson v. Miner's Bank*, 13, 107; *Walker v. Tucker*, 8, 672

51. *Where the language of a contract is not ambiguous*, but of plain and obvious import, the rule is imperative to follow the language employed in its interpretation. *Hawley v. Brumagim*, 13, 464

52. *Judicial notice of meaning of terms*.—Upon a covenant to work in "a proper and workmanlike manner," the court will not take either extreme of meaning which may be contended for upon those words, but will look to the lease to see how far the landlord has protected himself by the special terms of the contract. *Lewis v. Fothergill*, 15, 271

53. *Contract to seek for coal and when found, to pay*. *Olipphant v. Woodburn Co.*, 15, 365

E. Performance—Enforcement—Condition.

54. *Notice of termination of contract*.—Plaintiffs' contract was

CONTRACT—Performance,—etc. *Continued.*

subject to termination on six months' notice being given on either side from any period. *Held*, that the notice contemplated by the contract was notice from the corporation organized and doing business in California, and not notice of instructions from the committee of the London agency. *Bates v. Sierra Nevada Co.*, 1, 845

55. *Coal for engine for mutual drainage.*—Defendant agreed to find sufficient coal for plaintiff's engine to draw water from the mines of both parties, *as they then stood*. Plaintiff sank to a lower seam, in draining which he necessarily drained the other two seams, but consumed for his engine more coal than before. *Held*, that defendant was no longer bound to furnish any coal, because plaintiff had destroyed the measure of sufficiency. *Pringle v. Taylor*, 2, 458

56. *Delivery to administrator, after decease.*—Administrator held bound to receive slate contracted for by intestate. *Wentworth v. Cock*, 2, 470

57. *Continuous supply to forge.*—Where A was the owner of a furnace, and B of a forge, and A agreed to furnish B with 500 tons of pig metal, as B should need such metal for manufacture, B is not entitled to demand and have delivered to him the whole amount at once; the obligation of supply is limited to the wants of B's manufactory, and B was bound to notify A from time to time of the wants of his establishment. *Rodgers v. Love*, 2, 474

58. *Cleaning ore—Tools.*—A agreed to dig a certain quantity of iron ore annually, to clean it properly of all clay, sand, stone, etc., and deliver it to B, who agreed to furnish all screens, ropes and other implements necessary to work the banks. *Held*, that A was only bound so far to cleanse the ore as could be done with the implements furnished by B, using the same degree of skill and diligence as are ordinarily employed by persons in that business. *Held, also*, that such contract is indivisible. *Campbell v. Gates*, 2, 503

59. *Determination.*—After A had performed his contract in part, B wrote him a letter alleging that the ore was not properly cleaned, and refusing to receive any more ore unless A would allow B to make the ore good by "docking" what had been, and what would be received. A then tendered ore, but B refused, unless the docking was agreed to. The contract was thereby terminated as to A at his election, and he may sue for the refusal to perform. *Id.*

60. *Conditional contract—Developing salt well.*—An instrument as follows: "April 29, 1841, Jacob Waltz, Jr., do promise to pay unto William Morrow the sum of \$200 if said Jacob Waltz can get the salt well to do a good business; that salt well that Waltz and Morrow bought of Henry Taggart in Jefferson county, Ohio, on Island Creek." (Signed) "Jacob Waltz, Jr.," implies no obligation upon Waltz to endeavor to get the salt well to do a good business; and without such event no liability attaches. *Morrow v. Waltz*, 2, 520

61. *Breach of contract.*—A contract for the delivery of stone, to be measured in the walls of a particular building is not broken by the stone being laid elsewhere, if they could there be measured. The object of such a statement in the contract was to furnish proper facilities for measurement. *McClelland v. Snider*, 2, 531

CONTRACT—Performance, etc. Continued.

62. *Receipt of goods, knowing the quality.*—If the purchaser of goods with full knowledge of their condition voluntarily receives them from a ship and pays the duties on them, he can not afterward set up the fact that the goods were not of a merchantable quality. *Fitch v. Archibald*, 2, 555

63. *Measurement "more or less."*—A contract to run a drift 180 feet, "more or less," is completed when 180 feet have been run. *Gerrens v. Huhn Co.*, 2, 632

64. *Material excess.*—On such a contract plaintiff sued for 884½ feet, but did not aver that the additional feet were run at the instance of defendant, nor that the defendant had promised to pay for the same. *Held*, that the complaint did not state a cause of action. *Id.*

65. *Condition precedent—Waiver.*—The execution of the contract by the V. Coal Company to deliver all their coal for transportation was not a condition precedent, and by executing the terms of the original contract both parties waived the necessity of a more formal contract. *Chicago Co. v. Chicago Co.*, 2, 634

66. *Breach of condition.*—When, in the performance of a contract for labor, there are collateral conditions imposed on the party for whom the labor is done, the breach of such conditions justifies the abandonment of the contract by the laborer. *Monroe v. N. Pac. Co.*, 2, 652

67. *Second purchase of same ore.*—C. contracted with E. in March to deliver 1,000 tons of ore at a future date: before the delivery C. and his co-owners sold the ore to R., who delivered the ore to E., who paid C. therefor. The evidence showed that E. knew that R. was the owner of the ore at the time of the delivery thereof. *Held*, that R. could recover the price of the ore from E., notwithstanding his payment to C. *Randolph Co. v. Elliott*, 3, 63

68. *Contract licensing to sink oil wells, construed as to the remedy.* *Union Co. v. Bliven Co.*, 3, 107

69. *Sale of stock subject to division of profits on re-sale.* *Jones v. Kent*, 3, 190

70. *Note based on condition of mine yielding a profit.*—Maker ceases to work and sells the mine. Statute of limitations in such case. *Wolf v. Marsh*, 3, 204

71. *Conditional agreement—Vendor's lien.*—In settlement for extra work done by plaintiff in the building of a quartz mill for the defendant, and in consideration of a conveyance by plaintiff to defendant of his interest in the mill, the defendant agreed to pay plaintiff \$2,575 out of the first net proceeds of crushing and reducing ores of gold and silver in said mill from the defendant's mine, the debt not to be otherwise collectible until there were such net profits. There were no such profits. *Held*, that plaintiff had no right of action for the \$2,575, nor for the enforcement of a vendor's lien against the mill. *Toombs v. Consolidated M. Co.*, 3, 210

72. *Sale of mortgage bonds—Distribution of proceeds.*—A corporation issued bonds payable to bearer and secured by a mortgage on its property, franchises, etc. The directors authorized Jones to raise money

CONTRACT—Performance, etc. Continued.

for the corporation and delivered bonds to him as collateral for money he might raise. He borrowed money on his own note, pledged bonds to the lender, and applied the money for the company's use. The property, franchises, etc., were sold under the mortgage. In distribution of the proceeds: *Held*, that the lender was not to receive the full amount of the bonds and account to Jones, but that he was entitled only to his loan and interest. *Rice's Appeal*, 3, 688

73. *Formal acceptance not necessary.*—If a shaft be sunk according to contract, it is the duty of the party procuring the work to accept it, and the party sinking can not be prejudiced by the neglect of a formal acceptance thereof. *Eureka Co. v. Braidwood*, 4, 148

74. *Reasonable time for examination.*—Where work is to be accepted or rejected, the examination should be made when the work is tendered, or within a reasonable time thereafter. *Id.*

75. *Distinction between inability of contractor to perform and inherent impossibility of performance.* *Walker v. Tucker*, 8, 673

76. *Application of the distinction to exhausted coal mine.*—The lessee of coal mines, covenanting to work the same in a good and miner-like manner, is excused from further performance when the coal mines become exhausted. *Id.*

77. *Election of remedies for breach of entire contract.* *Isaacs v. McAndrews*, 9, 690

F. Abandonment—Rescission—Survival—Estoppel.

78. *Relaxation of terms by consent.*—If parties mutually adopt a mode of performing their contract, differing from its strict terms, or if they mutually relax its terms by adopting a loose mode of executing it, neither can go back on the past and insist upon a breach because it was not fulfilled according to the letter. He may require a return to the terms in future. *Hazleton Co. v. Buck Mtn. Co.*, 2, 339

79. *Parties are estopped by their own construction of their contracts.* *Chicago R. R. Co. v. Chicago Coal Co.*, 2, 634

80. *Tunnel contract—Provisions.*—A company owning a quartz ledge, having contracted for the running of a tunnel to cut the same, and having promised the plaintiff to pay for provisions to be furnished the tunnel contractor, in case the contractor failed to reach the ledge, is bound upon such promise to pay, the tunnel being abandoned without reaching the lode. *Van Duzen v. Star Quartz Co.*, 3, 26

81. *Strict interpretation of contract affected by loose observance of both parties.* *Forsyth v. North Am. Co.*, 11, 115

82. *Contingency for payment prevented by defendant's fault.* *Oliphant v. Wooburn Coal Co.*, 15, 365

83. *Power of mine owner to revoke contract to mine.* *Wando Co. v. Gibbon*, 16, 55

84. *No title nor right to hold against the owner's will,* goes with a mere contract to mine; the possession of the employe while it lasts is only a license to enter to perform the contract, and if the contract be revoked the right to hold possession ceases and damages is the only remedy. *Id.*

CONTRACT. *Continued.*

G. Public Policy.

85. *Excessive loan of national bank not void.* *Union Co. v. R. Mt. Bank,* 1, 432

86. *Unearned dividends.*—Consideration of contract for furnishing money to pay same. *Davis v. Flagstaff Co.,* 2, 660

87. *Voidable contracts—Option to be exercised in reasonable time.*—The general doctrine regarding contracts between a corporation and one who occupies toward it a fiduciary relation as director, is not that such contracts are absolutely void, but that they are voidable, and that the option to avoid must be exercised within a reasonable time. What is a reasonable time must be decided in each case upon all the elements of it which affect that question. *Twin Lick Co. v. Marbury,* 3, 638

88. *Store contract in restraint of trade.* *Crawford v. Wick,* 3, 541

89. *A contract to sell all the coal of certain beds to certain works, is not one of monopoly or against public policy from the fact that it involves, by implication, a covenant not to sell to other parties.* *Pol-lard v. Clayton,* 13, 335

H. Evidence.

90. *Wharfage on stone—Contract liability determined by sale of realty.*—K., the owner of a wharf, and S., the owner of a stone quarry, agreed in writing that all stone quarried on the premises of S. to be carried away in vessels, should be delivered at K.'s wharf at four cents per ton, wharfage, for nine years, and after that period at five cents per ton, wharfage. The agreement was fulfilled upon each side for nine years, after which S. sold his quarry. *Held,* that K. could not recover for a failure by S. to carry to K.'s wharf the stone quarried after the sale, and that evidence to show that the usual price of wharfage for the nine years was five cents per ton, was incompetent. *Knowlton v. Sewall,* 2, 591

91. *Divisible contract—Coal.*—A contract for the sale of a piece of land for a sum certain, and of coal under other lands payable by an annual royalty, *held,* on its face to be a divisible contract, but that parol evidence was admissible, that the land was necessary for vendee's enjoyment of the coal, and that it was the understanding at its execution that the contract was entire. *Graver v. Scott,* 2, 644

92. *Application of the rule excluding parol contradictions.*—Where a writing is not ambiguous, and there is no allegation of fraud, or mistake, its words, taken in their usual meaning, must be construed as expressing the true intent of the contracting parties, and the rule excluding resort to parol evidence must be applied. *Suffern v. Butler,* 3, 23

93. *Evidence of several contract on joint suit.*—If one is bound by contract to two persons severally, and only severally, their interests being also several, they can only sue upon it severally, and in a joint action they will not be permitted to introduce evidence of a several contract. *No. 5 M. Co. v. Bruce,* 3, 146

94. *Parol evidence, when admissible.*—Proof of any collateral parol agreement, or independent fact, which does not interfere with the

CONTRACT—Evidence. *Continued.*

terms of the written contract, though it may relate to the same subject-matter, is admissible; and whether such collateral agreement was made, or independent fact occurred, contemporaneously with, or as preliminary to the main contract in writing, is quite immaterial. *Baschor v. Forbes*, 13, 580

I. Ratification.

95. *Accord, distinguished from continuing contract.*—When coal was accepted by the seller by a parol agreement with the coal company, after the breach in settlement of damages claimed for the breach, *held*, to be an accord and satisfaction, and not a delivery under the former contract. *Neldon v. Smith*, 2, 371

96. *Doubt as to agent's power is removed by ratification.* *Shaver v. Bear River Co.*, 2, 537

97. *Ratification defined.* *Ellison v. Jackson Water Co.*, 4, 559

98. *Proof of a corporation entering upon land, prospecting the same, making partial payments under an executory contract known to all its agents without disaffirmance, may amount to proof of the contract without express evidence of formal execution or ratification.* *Durham v. Carbon Coal Co.*, 15, 380

99. *Acquiescence in irregularly executed contracts.*—When an equitable arrangement has been made dividing or exchanging interests in oil leases between parties jointly owning in the same, reduced to writing, signed by one for all, and acquiesced in by all—such agreement will be upheld against the proper parties the same as if they had attached their signatures. *Rice v. Ege*, 16, 179

J. Measure of Damages.

100. *Quarrying—Rate of payment.*—Where plaintiff agreed to quarry stone at a fixed price or rate, and the contract was not fully completed, the rate agreed on must still govern as to the amount of stone which was quarried. *McClelland v. Snider*, 2, 531

101. *Damages for shutting down work at mines.*—If the defendants, by refusing to furnish transportation, compelled the plaintiffs to desist from mining up to their reasonable production capacity, damages might be allowed for what would be the loss they suffered on the reasonable amount they were in due course mining. *Hazleton Co. v. Buck Mt. Co.*, 2, 389

102. *Payment for timber pro-rated on mine—Liquidated damages.*—By contract, S. agreed to furnish W. C. Coal Co. all the timber they should require at their mines during 1887; they to pay him eighteen cents on each ton of coal mined, and if the amount of coal mined fell short of 75,000 tons they were to pay the difference between the actual tonnage and the specified number of 75,000 tons. *Held*, that the price agreed on by the parties for the fulfillment of the contract was eighteen cents per ton on 75,000 tons, and that the eighteen cents paid on the tonnage not really mined was liquidated damages and not a penalty. *Wolf Creek Co. v. Schultz*, 3, 95

103. *Extent of repairs.*—Evidence of the amount expended in making the repairs was admissible as pertinent to the question of the breach of contract and as to damages. *Ardesco Oil Co. v. Richardson*, 11, 118

CONTRACT—Measure of Damages. *Continued.*

104. "*Repair*" means to restore to its former condition, not to change either the form or material. *Id.*

K. Miscellaneous.

105. *Real and personal contracts distinguished—Stone severed from the realty. Rhoades v. Patrick,* 2, 62

106. *Party making contract without power to fulfill, subsequently obtaining power. Carne v. Mitchell,* 2, 498

107. *Consideration of proper clauses to be inserted in contract agreed to be made between an iron company and a colliery. Beard v. Converse,* 2, 670

108. *Act regulating freight construed.*—On the day that the C. & A. R. R. increased the charge to \$9 per car an act of the General Assembly went into effect, to prevent extortion and unjust discrimination by railroad companies. *Held,* that the act was not designed to reach the case of a contract to carry on certain terms, which existed prior to the passage of the act. *Chicago Co. v. Chicago Co.,* 2, 634

109. *Mining statute—Special contract.*—The statute of Wisconsin governing the rights of miners, applies only where there is no special contract or lease fixing the rights of the parties. *Sobey v. Thomas,* 4, 360

110. *Lex loci—Place of demand—Rate of interest.*—Under a contract, made in New York, for services to be rendered in Montana, a demand of payment should be made at the domicile of the employer; but if payment is delayed or refused, interest should be reckoned according to the law of the place where the contract is performed. *Isaacs v. McAndrew,* 9, 690

111. *The remedy at common law is not cumulative* to the remedy upon contract when the common law right has been merged in an agreement lawful in all respects. *Smith v. Darby,* 13, 695

CONVERSION.

1. *Recovery of oil taken by trespasser.*—The severance of oil from the freehold does not divest the title of the owner, nor deprive him of his right of immediate possession, nor prevent his recovery of the oil so taken by action of replevin, or of its value from the one who took it from the well. *Hail v. Reed,* 11, 103

2. *One who without the authority of the owner sells his property* is guilty of conversion, although he has acted under the authority of one claiming to be the owner, and was ignorant of such person's want of title. *Bercich v. Marye,* 13, 544

3. *Confined to excuses alleged at time of conversion.*—When the refusal of a corporation to issue a certificate is placed upon a certain ground or excuse which is not valid, they can not be heard to allege other reasons on trial not before urged. *Bond v. Mount Hope Co.,* 14, 500

CONVEYANCE.

A—IN GENERAL.

B—PARTIES.

C—CONSIDERATION,

D—DESCRIPTION.

E—EXECUTION.

F—AGREEMENT FOR—ESCROW.

G—SEVERANCE.

H—QUIT CLAIM.

I—WARRANTY.

J—CONSTRUCTION.

K—POSSESSION—VERBAL SALE—BILL OF SALE.

L—NOTICE—INNOCENT PURCHASER—RECORD.

M—VOID.

N—ACKNOWLEDGMENT.

A. In General.

1. *Title, how passed.*—The title to mining property, considered as real estate, can pass only by deed or last will and testament. A wish expressed by H., shortly before his death, that his property should go to his mother, was ineffectual to pass the title. A delivery of the possession of the property to the agent of the mother by the holder of the legal title, would at the utmost only be a license, which until revoked, would justify her entry and receipt of the profits. *Hardenbergh v. Bacon*, 1, 352

2. *Minerals pass by deed.*—Minerals are a corporeal hereditament, and pass by apt words in a deed, though not susceptible of livery of seizin. *Caldwell v. Fulton*, 3, 238

3. *Conveyance of freehold estate.*—In North Carolina, freehold interests in lands may be conveyed by a simple deed of grant, and it is not necessary to use livery of seizin or deeds with sufficient consideration to operate under the statute of uses. *Adams v. Ore Knob Co.*, 3, 183

4. *Sale of corporate property.*—The trustees of a corporation can only exercise corporate powers when duly assembled and acting as a board, and the sale of corporate property requires the exercise of corporate power. *Gashwiler v. Willis*, 3, 516

5. *Utah statute of conveyances.*—The statute of conveyances of Jan. 18, 1855, Territory of Utah, did not apply to mining claims. *Kinney v. Con. Va. Co.*, 10, 459

6. *Where a quartz mill was built over a mine*, the mill agreeing to drain the mine, upon refusal to pump, forfeiture may be enforced. *Hamilton v. Kneeland*, 2, 583

B. Parties.

7. *A deed to the "Guatemala Mining Company"* shows on its face a grantee capable of taking, *Cochran v. O'Keefe*, 3, 288

8. *A deed to the "Middletown Oil Company,"* no such company being then incorporated, passes no title for want of a competent grantee. *Burns v. McCabe*, 7, 1

CONVEYANCE—Parties. *Continued.*

9. *Recitals in deed not binding upon strangers.*—A recital in a deed that the parties making it are the heirs at law of the former owner, binds only the parties making the deed and persons claiming under it, but is no evidence against strangers. *Yahoola River M. Co. v. Irby*, 14, 460

10. *Non-identity of names.*—When a deed in the chain of title is shown running to Jennie Forbes and a deed then offered out of Mary J. Forbes, there is no presumption of identity of persons without proof *aliunde* to that effect. *McGinnis v. Egbert*, 15, 829

11. *A deed to Henry Stull & Co. vests the legal title in Henry Stull.* *Ketchum v. Barber*, 15, 878

C. Consideration.

12. *Gift.*—A bill of sale of a mining claim should not be rejected as evidence because it is given without consideration, when, so far as the court knows, the owner has a full right to give away the claim. *Meyers v. Farquharson*, 3, 217

13. *Grant distinguished from license.* *Bracken v. Rushville Gravel Co.*, 3, 278

14. *Effect of the word "sold."* *Reaves v. Ore Knob Co.*, 3, 869

D. Description.

15. *Construction of deed where the center of a vein of iron ore was made a boundary line.* *Chester Co. v. Lucas*, 3, 843

16. *Lode known by two names.*—Construction of deed conveying lode claim where the same lode is known by two different names. *Weill v. Lucerne Co.*, 3, 878; *Philpotts v. Bladel*, 4, 341

17. *Monuments called for in a deed are prima facie well known.* Instance of obscure description maintained. *Myers v. Farquharson*, 3, 217

18. *Specific controls general description.*—Construction of "the Heathcock range." *Ross v. Heathcock*, 3, 404

19. *Parol evidence to identify land.*—Where land is described in several deeds in different terms, parol evidence to identify the premises as being one and the same is admissible. *Rockwell v. Graham*, 15, 299

20. *Quitclaim of overlap.*—Where part of the end of a location is adjudged to be in conflict with a prior claim, and thereupon the owners of the prior claim quitclaim the land in conflict to the owners of such location, whose possession thereof is not interrupted, the location will continue to include the land in conflict. *Cheesman v. Hart*, 16, 263

E. Execution.

21. *The characters "L. S." do not necessarily constitute a seal.* *McDonald v. Bear River Co.*, 1, 626

22. *A deed inadmissible to prove title may be admissible for the purpose of showing date of possession taken.* *Id.*

23. *Sufficient identification of bill of sale by illiterate witness.* *McGarrity v. Byington*, 2, 811

24. *Idem.*—Testimony by a subscribing witness that a paper was

CONVEYANCE—Execution. *Continued.*

signed in his presence "to the best of his recollection" sufficiently identifies it to be read in evidence. *Id.*

25. *Deed under seal by attorney without power under seal.*—A license to dig iron ore containing covenants signed, "Michael Garner [SEAL], William Irwin [SEAL], by agent, Miles McHugh:" *Held*, that McHugh, not being attorney in fact created by instrument under seal, and Irwin never having confirmed the instrument by deed, that it was not his deed; but that, having accepted the benefit of it, he was liable as upon a parol contract. *Grove v. Hodges*, 2, 698

26. *Use, distinguished from land.*—An instrument of writing not intended to grant the soil in fee, but the use only for the purpose of mining, is not a deed for the conveyance of land. *McBee v. Loftis*, 3, 222

27. *A deed executed by the trustees of a corporation* with their private seals attached, but without any corporate seal, is not the deed of the corporation, even though it purports to be executed on behalf of the company. *Gashwiler v. Willis*, 3, 616

28. *Conveyance of water.*—A water right is, under the law of Montana, "such a species of realty" as to require for its transfer the same form and solemnity as the conveyance "of other real estate." *Barkley v. Tieleke*, 4, 666

29. *Deed must be produced or accounted for.*—An interest in a mining claim being purchased by deed, the transfer can be shown only by production of the deed, or by proof of its loss and secondary evidence of contents. *King v. Randlett*, 5, 605

30. *Assigning the deed conveys not the claim.*—An assignment of a party's right, title and interest in and to a deed does not pass the title to the mining claim therein described. *Id.*

31. *Early mining district deed.*—A deed executed before the passage of any territorial conveyance act must still be proved as to its execution by the grantor. *Sullivan v. Hense*, 9, 487

F. Escrow.

32. *Construction of contract* providing for grantee working the claim and paying proceeds to grantor—holding the contract to amount to an escrow. *Beem v. McKusick*, 2, 533

G. Severance.

33. *The minerals beneath the surface* may be conveyed by deed, distinct from the right to the surface. *Caldwell v. Fulton*, 3, 238

34. *A deed may convey a distinct inheritance in mines*, the fee to the land remaining in the grantor. When not severed from the general title they pass with the soil without being expressly mentioned in the deed. *Hartwell v. Camman*, 3, 229

35. *Construction—Unknown mines—Paint stone.*—By a conveyance of "mines and minerals," the grant does not convey everything in the mineral as distinguished from the animal kingdom; but the expression can not be restricted to "metalliferous ores"; it includes mineral deposits in strata or beds as well as veins. In this case it was held to include a deposit of "paint stone." *Id.*

36. *Mining conveyances deal with the cube.* *Massot v. Moses*, 8, 607

CONVEYANCE. *Continued.*

H. Quit Claim.

37. *Potentiality of quitclaim deed.*—A quitclaim deed is as effectual to pass the title to real estate as any other, and the purchaser accepting such deed without notice of prior rights, will be as fully protected as if his deed contained full covenants of warranty. *Bradbury v. Davis*, 3, 398

38. *Quitclaim deed conveys legal title—Protects bona fide purchaser.* *Brophy Co. v. Brophy Co.*, 10, 603

I. Warranty.

39. *Warranty and habendum in construing lease.*—A lease of lands, containing the words "mines and minerals" in the *habendum* clause, and the covenants of warranty extending to "the aforesaid premises with every right and privilege and appurtenance to the same belonging:" *Held*, to allow the working of mines, although no mines were open at the time of the making of the lease. *Griffin v. Fellows*, 8, 657

40. *Office of the habendum stated.* *Id.*

41. *Subsequently acquired title.*—The doctrine that asserts that the subsequently acquired title of one man inures to the benefit of another, applies only where the latter is a purchaser of a title from the former and not to a case where the title is acquired by judgment. *Meyendorf v. Frohner*, 6, 559

J. Construction.

42. *Deed construed to be a conveyance, not a license.*—A conveyance of a tract of land with "the full right, title and privilege of digging and taking away stone-coal to any extent" the grantee might think proper, from under an adjoining tract owned by the grantor, is not a license, but a conveyance of entire ownership of the coal in place. *Caldwell v. Fulton*, 3, 288

43. *Deed construed against grantor.*—The rule that a deed is to be construed most strongly against the grantor applied to a forced or judicial deed. *Bushnell v. Proprietor's Ore Bed*, 3, 258

44. *Letters of agent to explain deed.*—A deed purported to convey all the "lands now in the occupation of Widow Kellett and sons," the deed being the consummation of a contract commenced by a series of letters of the grantor's steward, who was an active agent in the transaction, and had witnessed the deed: *Held*, that the letters were admissible in evidence to explain the latent ambiguity in the deed. *Beaumont v. Field*, 1, 281

45. *Granting clause controls habendum—Court to construe deed.* *McCurdy v. Alpha Mining Co.*, 3, 278

46. *The phrase, "the interest herein intended to be conveyed,"* commented upon and explained. *Id.*, 3, 286

47. *The word "also" implies something in addition to what has gone before.* *Id.*

48. *Parol evidence to explain deed.*—The nature and quantity of the interest conveyed by deed, is always to be ascertained from the

CONVEYANCE—Construction. *Continued.*

instrument itself; and is not open to explanation by parol evidence. *Caldwell v. Fulton*, 3, 288

49. *Parol evidence—Known minerals.*—Parol evidence is not admissible to show that when a deed was made conveying "all mines and minerals," copper ore alone was contemplated by the parties, or known to exist on the land, so as to restrict the operation of the words of the grant. Parol testimony may be received to explain the technical meaning of such words as "mines" and "minerals," but not to show that the parties to the deed gave any peculiar or restricted meaning to such words. *Hartwell v. Camman*, 3, 229

50. *Instance of two deeds construed as one indivisible transaction.* *Wallace v. Silsby*, 3, 390

51. *A proviso in the same deed with the covenant qualifies and controls the covenant.* *Foley v. Fletcher*, 4, 130

52. *A use can not be limited upon a use.*—But a deed purporting to create such use creates a trust. *Philpotts v. Blasdell*, 4, 341

53. *Conveyance of half interest not enlarged by sweeping clause.* *Fogus v. Ward*, 5, 1

54. *Construction of sweeping clause.*—*The sweeping clause can not be construed except in context with the granting clauses.* *Id.*

55. *Certain extrinsic evidence essential to the understanding of conveyances.* Parol evidence is always admissible (1) to identify the land conveyed with the land described; and (2) to explain the latent meaning of the language used in describing it. *Reamer v. Nesmith*, 5, 610

56. *The doing dominates the intent.*—In construing a deed the question is, not what did the grantor intend to do, but what has he done by apt and proper words. *Vanatta v. Brewer*, 6, 358

57. *Deeds of same date construed together.*—The devisees of the senior patent made on the same day two deeds to the same grantees, in one of which the ground covered by the decree was excepted and in the other it was not: *Held*, that the two deeds were to be construed as one transaction and their effect was the same as if the exception had been mentioned in both. *Anderson v. Harvey*, 7, 291

58. *Covenant in deed—Of its character.*—A covenant in a conveyance of mineral in the ground, by the grantee to the grantor, to pay the latter a certain sum per ton for the mineral removed, is not a collateral covenant, but is a covenant to pay the purchase money for the sale of all the mineral in the manner specified. *Manning v. Frazier*, 8, 307

59. *Men's grants must be taken according to common intentment,* not straining the language to the destruction of the inheritance. *Asiry v. Ballard*, 8, 816

60. *Implied grants.*—When anything is granted all the means to obtain it and all the fruits and effects of it are also granted. By the lease the lessee took the "mines and minerals" and every "privilege" thereof; this gave him the right to the minerals and the right to dig for them. *Griffin v. Fellows*, 8, 637

61. *Construction of deeds.*—In the construction of deeds the tech-

CONVEYANCE—Construction. *Continued.*

nical rules of the English books must be applied—with reference to the ignorance of the American scrivener. *French v. Brewer*, 11, 108

62. *Where the operative words of grant in a deed are clear*, they are not to be controlled by inadvertent expressions indicating a contrary intentment in the less formal parts of the deed. *Doe v. Wood*, 9, 183

63. *Grantor's own belief*.—In the construction of a grant the question is not what the grantor supposed he had done, but what he really has done by his grant. *Id.*

64. "*Mining ground*."—Technical meaning of the words stated. *Hale Co. v. Story County*, 14, 115

K. Possession—Parol Sale—Bill of Sale.

65. *Where a written transfer is shown to have been made* the parol evidence must be stricken out. *Crary v. Campbell*, 3, 270

66. *Transfer by corporate organization and delivery of possession*.—Where by the mining customs the title to a mining claim may be transferred by delivery of possession without deed, the formation by the locators of a corporation and the placing of such corporation in possession, gives it title to the claim, and suit may be maintained to force it to issue stock to the locators, pursuant to the agreement made at the time it was formed and received possession. *Blodgett v. Potosi Co.*, 3, 275

67. *Oral sale of mining claim*.—An agreement by the locators of a mining claim to make an oral transfer of their respective interests in the claim at the time in the adverse possession of another, is not sufficient to pass title. Under such circumstances, a written instrument is necessary. *Copper Hill Co. v. Spencer*, 3, 267

68. *An oral sale is valid only where grantor is in possession, and accompanies the sale with a transfer of possession*. *Id.*

69. *Bill of sale—Caveat emptor*.—A bill of sale for a mining claim not under seal, purporting to convey only the interest of the vendor without warranty, conveys only the present right of the maker of such instrument. The purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of *caveat emptor* applies in every such case. *Clark v. McElvy*, 3, 254

70. *No precise form of words is necessary in a bill of sale*.—If it be clear that the maker intended to make a bill of sale, and to pass thereby the title to property, the law will, if possible, so construe the words used as to effectuate that intent. *Meyers v. Farquharson*, 3, 217

71. *Conveyance not under seal—Evidence*.—A mining claim may be conveyed by bill of sale or instrument in writing not under seal as provided by statute in California, and such instrument is admissible in evidence. *St. John v. Kidd*, 4, 455

72. *Bill of sale as evidence*.—It was objected to the introduction of a bill of sale in evidence, that it purported to be executed by Jones, one of the three grantors, by his attorney in fact; who, it was shown, had at the time a written power, which was not produced at the trial. *Held*, that the objections pertained, not to the admissibility of the bill

CONVEYANCE—Possession, etc. *Continued.*

of sale, but to its effect when admitted; and that it was proper evidence to show a conveyance by the other grantors. *Id.*

73. *Parol sale of claim.*—The statute of 1860 is mandatory that sale of mining claims must be in writing. *Felger v. Coward*, 5, 273

74. *Possessory title conveyed by deed.*—Title by occupancy is, under the Colorado statutes, an interest in real estate, and such an interest as may be the subject of conveyance by deed. *Sears v. Taylor*, 5, 318

75. *Title transferred by delivering possession.*—Upon questions as to the occupancy of public mineral land, a transfer of the right of the occupant to the possession may as well be evidenced by agreement as by deed, *when followed by possession.* *Jackson v. Feather River Co.*, 5, 594

76. *Conveyance of mining claim by parol.*—The actual transfer of the possession of a mining claim followed by actual occupation by the transferee conveyed a good title in early days in Nevada, and this old rule will not be disturbed. *Kinney v. Con. Va. Co.*, 10, 459; *Lockhart v. Rollins*, 16, 16

77. *Parol transfer.*—A written conveyance is not necessary to pass the title to a possessory mining claim. *Table Mountain Co. v. Stranahan*, 9, 457; *Union Co. v. Taylor*, 5, 324

78. *Verbal sale of mining claim.*—A verbal sale of a mining claim, even if accompanied with a delivery of possession, does not pass the legal title. *Goller v. Fett*, 11, 171; *King v. Randlett*, 5, 605; *Garthe v. Hart*, 15, 493

79. *Conveyance not under seal.*—Instruments conveying mining claims need not be under seal. *Draper v. Douglass*, 5, 601; *Jackson v. Feather River Co.*, 5, 594. *Contra, McCarron v. O'Connell*, 14, 429. See note 14, 3, 415

L. Notice—Innocent Purchaser—Record.

80. *Notice of covenant in title papers.*—The law conclusively charges the purchaser of lands with knowledge of a covenant in the deeds which constitute the muniments of his title, that no part should be sold from off such premises. *Brewer v. Marshall*, 4, 119

81. *Rights incident to land enforced against purchaser with knowledge.*—Cases reviewed, illustrating the principle of preventing the alienee of lands, having knowledge of the just rights of another, from defeating such rights, aside from the existence of an easement or covenant adhering to the title. *Id.*

82. *Innocent purchaser.*—The plea of purchaser for valuable consideration, without notice, must aver the consideration and actual payment of it, which payment must be proved; the averment of a consideration secured is not sufficient. *McBee v. Loftis*, 3, 222

83. *Release of warranty, is a deed* concerning lands admissible to record, and may be proved in evidence under the recording acts. *Susquehanna Co. v. Quick*, 1, 201

M. Void.

84. *Void deed—Abandonment—Appropriation.*—Where the owner of a ditch attempts to convey the same by a deed which is void, but places the grantee in possession, who continues to use the ditch, it

CONVEYANCE—*Void. Continued.*

operates as an abandonment of his appropriation by the grantor and as a new appropriation by the grantee, dating from the change of possession. *Barkley v. Tieleke*, 4, 666

84. *Deed by appropriators of town site.*—A corporation had a tract of land surveyed for a town site which embraced certain land claimed by B. and E., to whom the corporation relinquished the conflicting area: *Held*, in a controversy relating to the tract claimed by B. and E., that a deed from the corporation for such tract conveyed no title: 1, because it never claimed it, and 2, because it never made such improvements on the tract as to constitute possession. *Robinson v. Imperial Co.*, 10, 370

85. *Deed of bounty land prior to patent, void.*—Where land was located under a military land warrant issued under the act of Congress of May 6, 1812, a deed of it, executed prior to the issue of patent, is invalid. *Stephenson v. Wilson*, 13, 408

N. Acknowledgment.

86. *Deed unacknowledged.*—Under the statutes of Montana, a deed is good if acknowledged, without proof of execution; or if not acknowledged, but accompanied by proof of execution; and in either event, when recorded, it imports notice to the world. *Belk v. Meagher*, 1, 522

87. *The acknowledgment is no part of the deed*, and as between the parties to the instrument the deed is good without acknowledgment or record, these being required only for the protection of third parties. *Taylor v. Holter*, 3, 322

88. *A deed of mining property acknowledged before a justice of the peace* of another county, without the statutory certificate attached, is not admissible without proof of execution. *McGinnis v. Egbert*, 15, 329

CORPORATIONS.

A—ORGANIZATION—ARTICLES—CHARTER.

B—OFFICERS—AGENTS.

C—STOCK.

D—STOCKHOLDERS.

E—ELECTIONS—MEETINGS.

F—BY-LAWS.

G—CONTRACTS—POWER—DUTIES.

H—PERSONAL LIABILITY.

I—SEAL.

J—DISSOLUTION—CONSOLIDATION.

K—QUO WARRANTO.

L—ULTRA VIRES.

M—FRAUD.

N—MISCELLANEOUS.

O—FOREIGN.

A. Organization—Articles—Charter.

1. *Consideration of contract between organizers to make advances to the company, as to what is equitable distribution between such organizers.* *Merrick v. Peru Co.*, 3, 584

CORPORATIONS—Organization, etc. Continued.

2. *Cause of action arising before incorporation of company—Taking deed before organization.* *Snow v. Thompson Oil Co.*, 3, 15; *Vermont Co. v. Windham Co. Bk.*, 3, 312
3. *Proof of corporate organization.*—The organization of a corporation may be proved by its records and parol proof, without the production of its list of subscribers. *Crump v. U. S. M. Co.*, 3, 453
4. *Fraudulent organization of corporation—Paying up stock by the form of delivering checks which are never presented.* *Field v. Pierce*, 3, 535
5. *Defective organization cured by legislative act.* *Basshor v. Dressel*, 3, 591
6. *Corporate authority a trust.*—The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. *Wright v. Oroville Co.*, 3, 538
7. *Corporate title where vested.*—The legal title to the property of a mining corporation is vested in the corporation and not in the stockholders. *Id.*
8. *Non-resident incorporators—Filing certificate.*—The statute does not require that the incorporators or officers shall be residents of the State, nor that the certificate of incorporation be executed within the limits of the State; nor does the statute in terms require a meeting of the incorporators prior to the execution of the certificate; such execution under the statute is analogous to the execution of a deed of conveyance, and is of no validity without delivery. It is the filing of the certificate that brings the corporation into existence. *Humphreys v. Mooney*, 4, 76
9. *Validity of incorporation—Omission in certificate.*—As a general rule the validity of a corporation can not be questioned collaterally. The omission from the certificate of the clause as to the assessability of the stock, can not, in the absence of fraud, be regarded as essential to the corporate existence in an action by one against the individual members upon a contract with the company. *Id.*
10. *First existence of corporation.*—A corporation exists as a legal entity from the time of the filing of its articles. *Coyote M. Co. v. Ruble*, 4, 88
11. *Proof of organization or charter.*—To establish the existence of a corporation *de facto*, a charter or some law under which the assumed powers are claimed to be conferred, and user of the franchise thereby obtained, must be shown. *Abbott v. Omaha Co.*, 4, 8
12. *Filing articles.*—In Nebraska, the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and articles so filed, taken together, are considered in the nature of a grant from the State, and constitute the charter of the company. *Id.*
13. *Premature action of organizers.*—The organizers of a corporation can not, by their action before the completion of the incorporation and the election of directors, dispose of the future earnings of a

CORPORATIONS—Organization, etc. Continued.

corporation, or control the action of the directors to be elected. *Coyote Co. v. Ruble*, 4, 88

14. *Failure to file duplicate articles* might be sufficient to justify *quo warranto*, but will not invalidate the corporation as to third persons. *Humphreys v. Mooney*, 4, 76

15. *Burden of proof* to show the legality of corporate organization, considered. *Warner v. Daniels*, 6, 436

16. *The incorporation laws a part of the charter—Implied notice of liability.*—The general act under which a company becomes incorporate and its articles of incorporation, taken together, constitute the charter of incorporation, the acceptance of which charges the corporation with knowledge of all the duties prescribed by the act, and of all consequent liabilities. *Van Etten v. Eaton*, 12, 12

17. *Trustees can not deny the charter.*—Parties who sign a certificate of incorporation and accept the office of trustees thereunder, can not, in an action against them for waste of the corporate property, etc., deny the validity of the act of incorporation. *Parrott v. Byers*, 13, 505

18. *Proof of corporate existence.*—A copy of its Articles of Association certified by the Secretary of State is "properly authenticated" for filing in a foreign State, under a statute requiring in general terms an authenticated copy to be filed. *Hammer v. Garfield Co.*, 16, 125

B. Officers—Agents.

19. *Trustee holding salaried office.*—A trustee of a corporation who has performed services and earned a salary as treasurer under contract with the company, can not, in the absence of fraud, be deprived of such salary, on the ground that the by-laws forbid the trustee holding any other office. *Neall v. Hill*, 1, 80

20. *Damages for depreciation of stock* can not be charged against the officers of a corporation except in a clear case based on gross neglect or willful misconduct. *Id.*

21. *Officers de facto.*—The acts of the *de facto* officers of a mining corporation are valid whenever they concern third persons who had a previous right to demand the act, or have paid a valuable consideration for it. *Savage v. Ball*, 2, 579

22. *Irrevocable power of attorney.*—An effort in such contract to make one "P." the irrevocable agent of the company, held to be beyond the powers of the corporation or directors, and void. *Davis v. Flagstaff Co.*, 2, 660

23. *Representations of president.*—The president of a corporation is not *ex officio* the agent of the corporation to sell property which it may have directed to be sold, and unless appointed agent to sell, his representations are not binding on the corporation. *Crump v. United States M. Co.*, 3, 455

24. *Compensation to president for services.*—Without special provision by law or resolution for payment for his services, the president of a mining corporation can not recover therefor. *Merrick v. Peru Co.*, 3, 583

CORPORATIONS—Officers, etc. *Continued.*

25. *Officers may deal with it as if strangers. Id.*

26. *Contract of director with company.*—A director of a corporation is not prohibited from lending it moneys when needed for its benefit, and the transaction is open; nor is his purchase of its property at a fair sale under trust deed securing his loan, an invalid transaction. *Twin Lick Oil Co. v. Marbury*, 3, 688

27. *Powers of president.*—He has no authority to contract for purchase of property not required in the usual course of business. *Blen v. Bear River Co.*, 3, 485. He has *prima facie* power to hire labor. *Steel v. Solid Silver Co.*, 3, 155

28. *Advances by president.*—And for advances in aid of its purchases or business he can sue and recover money loaned. *Merrick v. Peru Coal Co.*, 3, 563

29. *Extra pay to secretary.*—The secretary of a private corporation, at a fixed salary, can not recover extra pay for services in that capacity. *Carr v. Chartiers Coal Co.*, 3, 476

30. *Recovery by treasurer on audited amount—Usury.*—When the treasurer of a corporation, with the knowledge and consent of the directors, has raised money for the company on his own credit, paying interest above the legal rate, and his accounts, showing such extra interest, have been audited and allowed, a recovery for the balance, including such interest, is not illegal. *Wood Hydraulic Co. v. King*, 3, 618

31. *Corporation held to representations of agent.*—A corporation is bound by the misrepresentations of its agent authorized to sell, though of limited powers, and although they were neither authorized by nor known to the company. *Crump v. U. S. M. Co.*, 3, 455

32. *Director may deal with corporation same as stranger—Deed of trust to such officer.* *Harts v. Brown*, 4, 1

33. *Relation of director to company when purchasing its bonds or property, considered. Id.*

34. *Idem—Purchase at foreclosure not in good faith, if company able to redeem.*—Where a corporation has money, or assets convertible into money, the purchase of its bonds or lien indebtedness by directors as a means of enforcing sale of its property would be in bad faith, and the title thus acquired would not be sustained in equity. *Id.*

35. *Duty of directors to dispose of remaining assets after loss of its substantial property. Id.*

36. *Director may recover for extra services.* *Santa Clara Mining Ass. v. Meredith*, 4, 44

37. *Sale of corporate bonds by agent—Application of purchase money.*—Where a corporation places its bonds before maturity in the hands of an agent with power to negotiate them, a purchaser may presume that the agent is acting within the scope of his authority, and is not bound to inquire into the application made by the agent of the proceeds of the sale. But if the purchaser is informed or has notice of intended misapplication before purchase, he buys at his peril. *Chew v. Henrietta M. Co.*, 4, 67

38. *Directors by operation of law.*—The persons who are named

CORPORATIONS—Officers, etc. Continued.

by the corporators in the certificate as directors for the first year are created such directors by operation of law, and not by election of the stockholders after the corporation is formed. *Humphreys v. Mooney*, 4, 76

39. *Relation of corporation to its officers.*—The shareholders constitute the company, and the acts of the directors can be inquired into at their instance. A fraud against a corporation by any or all of the directors, may be redressed by an action in the name of the corporation. *Simons v. Vulcan Oil Co.*, 6, 634

40. *Power of board of directors to appoint and remove agent* is a trust and they can not surrender such power to a stranger. *Flagstaff Co. v. Patrick*, 4, 19

41. *Bonds issued to directors and accepted by the stockholders* can not be complained of by a subsequent creditor. *Bassett v. Monte Christo Co.*, 4, 108

42. *Misuse of company funds.*—Charging the superintendent with depositing the company funds with a mercantile house instead of in a bank, and with refusal to pay claims against the company, can not be considered breaches of duty when unaccompanied by special allegations showing it to be his duty to do otherwise. *Sherman v. Clark*, 7, 483

C. Stock.

43. *The instruction "The defendants had a large majority of the stock, therefore the control of the company was entirely in their hands," held* to be erroneous; the fact being that defendants had but two out of five directors. *Carter v. Philadelphia Co.*, 2, 287

44. *Ratification—Sale of old stock instead of issuing new.*—The stockholders ordered the directors to create new stock and sell it; instead thereof the directors acquired original stock and sold it. *Held*, that such act might be ratified subsequently by the stockholders so as to render the sales valid and binding upon the purchasers. *Crump v. U. S. M. Co.*, 3, 455

45. *Preferred stock, when illegal.* *Kent v. Quicksilver M. Co.*, 4, 47

46. *Premature assessments.*—Stock can not be assessed before the election of the board of directors. *Coyote Co. v. Ruble*, 4, 83

47. *No injunction will be granted* against application to the Legislature for authority to issue additional shares. *Bill v. Sierra Nevada Co.*, 7, 418

48. *A corporation can not reduce its capital stock, by purchasing the shares of any stockholder.* *Currier v. Lebanon Slate Co.*, 13, 559

49. *Net earnings defined*, under act taxing such earnings. *Com. v. Penn Co.*, 14, 168

D. Stockholders.

50. *Combination by part of stockholders to control corporation*, not necessarily against public policy. *Faulds v. Yates*, 3, 551

51. *Contract of its members with the corporation.*—A shareholder, even if he is an officer, may deal with, sue and be sued by a corporation. *Merrick v. Peru Co.*, 3, 583

CORPORATIONS—Stockholders. *Continued.*

52. *Corporate acts alienating corporate property bind stockholders.*
Wright v. Oroville Co., 3, 558
53. *Contract made by stockholders treated as the contract of the corporation itself.* *Gordon v. Swan,* 3, 84
54. *No power in stockholders to authorize sale of corporate property.* *Gashwiler v. Willis,* 3, 516
55. *Stockholders' right to redeem mine—Collusion between corporation and creditor.* *Wright v. Oroville Co.,* 3, 559
56. *Stockholders' not liable to each other for corporate default.*
Bainbridge v. Gehring, 3, 40
57. *What amounts to completed subscription for stock.* *Coyote Co v. Ruble,* 4, 88
58. *Bona fide stockholder—Void election.*—At a meeting of stockholders for the election of trustees, 1,000 shares were represented by a person to whom the stock had been issued as trustee, without the consent or knowledge of the owners. Without him a majority of the stock was not represented at the meeting. *Held,* that he was not a *bona fide* stockholder within the meaning of Sec. 312, Code of Civil Procedure, and that the election was void. *Stewart v. Mahoney Co.,* 4, 106
59. *Stockholders can not complain of wrong done to corporation.*
McAleer v. McMurray, 6, 606
60. *Lex loci domicilii.*—In a suit arising under a charter of another State, the decisions in that State are the best evidence of the rights and duties of stockholders under it. *Merrimac M. Co v. Lery,* 13, 467
61. *Company not responsible for stockholder* where stock is purchased from him by a third party. *Kelsey v. Northern Light Co.,* 13, 497
62. *Suit by stockholders in lieu of corporation.*—In an action by the stockholders against the trustees, praying for an accounting and an injunction to stay waste, the answer denied the trust and also the existence of the corporation itself: *Held,* that this denial dispensed with the necessity of averring in the complaint that the trustees had been requested to institute an action in the name of the corporation for the redress of the grievances complained of, inasmuch as it was obvious from the answer that such a demand would have been refused; nor is it a defense that it was in the power of the plaintiffs to elect a new board of trustees, and thus cause an action to be brought in the name of the corporation. *Parrott v. Byers,* 13, 505
63. *Injunction—Stockholders against trustees—Sufficient proof of title.*—A board of trustees of a mining corporation denying the corporate ownership, and asserting title in their own right, and working the lode for their own benefit, may be enjoined at the suit of one or more stockholders, and in such case evidence of prior possession in the corporation and the entry by defendants as the trustees of such corporation, will support a finding in favor of the plaintiff, as to the ownership. *Id.*
64. *A single shareholder can not constitute a meeting of a company under the Stannaries Act.* *Sharp v. Daves,* 13, 576

CORPORATIONS—*Continued.**E. Elections—Meetings.*

65. *Term of original trustees as fixed by statute*, not to be shortened by by-law. *State v. Lady Bryan Co.*, 3, 526

66. *Meetings outside of the State* not to be collaterally attacked and will be held valid if charter provide for them. *Humphreys v. Mooney*, 4, 76

67. *The election of directors* is a condition precedent to the perfect organization of a corporation (under Oregon statute), but it may hold property before that. *Coyote M. Co. v. Ruble*, 4, 88

68. *Corporate meetings—How called.*—When the by-laws provide that meetings of stockholders shall be called by the board of trustees, a meeting called by the president of the company is illegal. *State v. Cettineli*, 12, 518

F. By-Laws.

69. *Irregular by-laws* may be made valid by user. *State v. Curtis*, 3, 680

70. *The election of a trustee is a corporate act* and a by-law can not control corporate acts when the charter provides otherwise. *Id.*

G. Contracts—Powers—Duties.

71. *Corporate powers under charter—Smelting works, houses, etc., treated as incidentals.* *Moss v. Rossie Co.*, 1, 289

72. *Power of corporation* is limited by the grant of its charter or by necessary implication. *Davis v. Flagstaff Co.*, 2, 660

73. *Limit of power in case at bar.*—The defendant company was limited in its power to negotiate loans by its articles of association, and the directors had no authority to borrow money beyond that granted, and in the manner specified; and it was prohibited from paying dividends, except from profits. *Id.*

74. *Notice of powers of corporation* implied from the parties previous dealings with and relations to it. *Id.*

75. *Essential power to contract.*—The power to contract and to bind itself to those dealing with it, in matters within the intent of the charter, is a necessary incident to every mining corporation, and needs no express grant of such power. *Wood Hydraulic H. M. Co. v. King*, 3, 618

76. *Promise of officer to pay corporate debt—Pleading.*—Held, that the promise of the officer, if it created any contract at all, made a contract of suretyship, and created no joint liability upon the contract of the corporation. *Youghioghney Shaft Co. v. Evans*, 3, 102

77. *Substituting stockholders for corporation.*—This suit having been brought in the name of a corporation, which the chancellor found, in the progress of the cause, to have no legal existence, the individual stockholders were by amendment made parties. Held, a proper exercise of discretion in the court below on that view of the case. *Vermont Co. v. Windham County Bank*, 3, 813

78. *Essential powers of corporations* are the power to execute and issue bonds, contracts and other certificates of indebtedness, public and private, and such powers are inseparable from their existence. *Watts' Appeal*, 8, 222

CORPORATIONS—Contracts, etc. *Continued.*

79. *Implied powers.*—The power to contract necessarily involves the power to create a debt. The charter of a land company gave the directors power to dispose of its land by deed or lease; the power to mortgage land on a proper occasion and for a proper debt is implied.

Id.

80. *Incidental powers.*—The corporation, owning a very large body of lands, had power by their charter "to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country." *Held*, that the building of saw mills and a hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation, was within its powers. *Id.*

81. *Corporate powers*, unless expressly restrained by law, are unlimited over their property. *Ardesco Oil Co. v. North American Oil Co.*, 8, 590

82. *Admissions by corporations.*—A corporation accepting the services of a person as treasurer, and ratifying and auditing his accounts, which show a balance against the company, is bound by the admission, as an individual would be. *Wood Hydraulic M. Co. v. King*, 3, 618

83. *Ratification of purchase made by president* assumed, notwithstanding incompleteness of report of such purchase made to the board. *Blen v. Bear River Co.*, 3, 435

84. *A corporation may assume the debts of its organizers.* *Paxton v. Bacon M. Co.*, 3, 513

85. *Contracts of organizers* do not bind the corporation unless adopted or ratified by it upon the perfection of its organization. *Coyote M. Co. v. Ruble*, 4, 88

86. *Power of the board to transfer the entire corporate property*, under special charter, upheld. *Featherstonhaugh v. Lee Moor Co.*, 3, 496

87. *Power to act by directors.*—The general rule is that the directors may do any act within the corporate powers, unless restrained by the by-laws or by vote of the stockholders. *Wood Hydraulic H. M. Co. v. King*, 3, 618

88. *Directors can not borrow money.* *Burmester v. Norris*, 3, 449

89. *Powers of trustees.*—The board of trustees of a corporation may control the corporate property within the limit which the law has assigned to the exercise of corporate authority. *Wright v. Oroville M. Co.*, 3, 558

90. *The trustees of a corporation* can bind it only when they are together as a board, acting as such. *Hillyer v. Overman Co.*, 3, 44

91. *Knowledge of charter limitations is implied* in those who deal with corporations. *Alexander v. Cauldwell*, 5, 650

92. *A corporation* legally organized is a citizen, and may purchase and hold a claim. *North Noonday Co. v. Orient Co.*, 9, 530

93. *A corporation (mining) may make a promissory note* for a debt contracted in the course of its legitimate business, although not specially authorized by its charter to contract in that form. *Moss v. Oakley*, 12, 1

CORPORATIONS—Contracts, etc. *Continued.*

94. *Right to purchase* is implied where the stated object of a company is to work a colliery. *Baglan Hall Colliery Co., In re*, 13, 261

95. *The right of a corporation to make a promissory note* in the transaction of the business contemplated in its charter is recognized by the Revised Statutes. But it must affirmatively appear that it was made in the course of its legitimate business; the fact will not be presumed. *McCullough v. Moss*, 13, 440

96. *Contract of corporation before incorporation*.—An agreement by the owners of a mine among themselves that a third party is entitled to 2,500 shares of the stock of a corporation which they are about to organize, on the payment by him of his *pro rata* of the purchase money paid for the mine, and of the expenses in working, is not the agreement of the corporation subsequently organized. *Morrison v. Gold Mt. M. Co.*, 13, 578

97. *A corporation is competent to locate a mining claim* upon the public domain in like manner as individual citizens, if it be duly organized under the laws of one of the States. *McKinley v. Wheeler*, 16, 65

98. *A corporation can not contract*, experiment with the subject-matter of the contract, and then successfully defend for the want of a formal execution of the contract. *Durham v. Carbon Coal Co.*, 15, 380

99. *The company under an informal contract* experimented under a prospecting agreement: *Held* estopped to deny its obligations under the contract. *Id.*

100. *Supply store by corporation—Shareholders' liability*.—A mining corporation may, under its general charter, keep a supply store out of which to pay its employes in kind, instead of money, and the fact that it sells these goods by retail to third persons is no ground for holding the stockholders liable as partners, even if such sales be *ultra vires*. *Searight v. Payne*, 13, 401

H. Personal Liability.

101. *Corporation can not be held for debts of organizers* or for debts of older corporations of which they were members. *Paxton v. Bacon M. Co.*, 3, 512

102. *Idem*.—The stock of the members forming the old firm would be liable for their debts but the creditors could have no claim on the stock of the other party, nor against the property of the firm. *Id.*

103. *Personal responsibility of directors* to the stockholders is the subject of chancery jurisdiction. *Robinson v. Smith*, 3, 443

104. *Distinction between liability for no report and false report*. *Bonnell v. Griswold*, 4, 15

105. *Personal liability of stockholder—Value of lands used to pay up stock, inquired into*. *Douglass v. Ireland*, 4, 33

106. *Simultaneous action against trustees*.—An action brought against the trustees to charge them under the laws of New York with the same debt, because of failure to make the annual report, is no bar to an action against stockholders based on their personal liability. *Id.*

107. *Directors not liable for mistake in exercise of discretion*. *Watts' Appeal*, 8, 223

CORPORATIONS—Personal Liability. *Continued.*

108. *No individual liability attaches to members of a corporation by reason of any omission to organize in the manner prescribed by the incorporation act.* *Humphreys v. Mooney*, 4, 76
109. *Publication in newspaper nearest to place of business.*—What amounts to. *Cameron v. Seaman*, 13, 584

I. Seal.

110. *The corporate seal is no longer essential to constitute a corporate contract.* *Durham v. Carbon Co.*, 15, 380
111. *Corporation may contract, without seal.* *South of Ireland Co. v. Waddle*, 3, 533
112. *Failure to prove seal.*—Where assumpsit was brought against a corporation on a contract signed with a scroll and the contract was admitted without objection, the objection to such contract as a specialty is waived. It is too late to prove that the scroll was the corporate seal. *Wolf Creek Co. v. Schultz*, 3, 95

J. Dissolution—Consolidation.

113. *No dissolution by decree.*—A court of equity may compel the officers of a corporation to account, or may restrain the violation of trusts by such officers, but can not dissolve the corporation or make a decree which would indirectly necessitate such a result. *Neall v. Hill*, 1, 80
114. *Note of insolvent corporation.*—The insolvency of a mining company does not of itself invalidate a note given for a *bona fide* debt. *Savage v. Ball*, 2, 579
115. *Irregular corporate action.*—Where, the stockholders being only three persons, no formal votes were taken by the directors as a board, nor were officers re-elected, and all proceedings were informal, these facts did not cause the corporation to cease to exist nor deprive it of its rights in the premises. *Vermont Co. v. Windham County Bank*, 3, 313
116. *The cessation of all operations for a certain time, or the letting of the entire corporate property to strangers for a definite period, is not necessarily an abandonment of the purposes of a mining company.* *Featherstonhaugh v. Lee Moor Co.*, 3, 496
117. *A new company successor to a former company takes the property subject to its debts.* *Barksdale v. Finney*, 14, 541
118. *Successor to its organizers.*—The owners of a mining claim became incorporated and placed their corporation in possession: *Held*, that the title passed as effectually as if the transfer had been by deed. *Table Mountain Co. v. Stranahan*, 9, 457

K. Quo Warranto.

119. *Private company performing corporate acts.*—Neither trading as a company, nor the issue of shares transferable to bearer, make the company illegal on the ground of usurpation of corporate franchises. *Mexican Co., In re*, 2, 36
120. *The regularity of the organization of a corporation can not be questioned in a collateral way.*—If franchises not granted by statute

CORPORATIONS—Quo Warranto. Continued.

- have been usurped, the inquiry must be made by a direct proceeding to seize the franchises to the people and dissolve the corporation. *Meeker v. Chicago Steel Co.*, 10, 208; *Crump v. U. S. Co.*, 3, 454
121. *Violations of charter not to be collaterally investigated*; that must be done by the government in a direct proceeding. *Union Water Co. v. Murphy's Flat Co.*, 3, 488; *Doyle v. Peerless Co.*, 14, 569
122. *Courts of equity do not take cognizance of such questions in respect to corporations.* *Doyle v. Peerless Co.*, 14, 569

L. Ultra Vires.

123. *Corporation contracting in foreign State.*—Although a corporation, as such, can do no corporate act out of the limits of the State granting its charter, yet its agents and officers may bind it by contracts made in other States, and the minutes of its board of directors may be used as evidence of the acts of the board, even though the meetings of the board were held out of the State. *Wood Hydraulic Co. v. King*, 3, 618; *Bassett v. Monte Christo Co.*, 4, 108
124. *Ultra vires; iron company enjoined from building flour mill.* —*Cherokee Iron Co. v. Jones*, 3, 628
125. *A corporation is not bound by an unauthorized contract made by its board of directors*; such contract can be treated as *ultra vires*, and is not binding upon the corporation. *Flagsaff Co. v. Patrick*, 4, 19
126. *Acts ultra vires, assented to by the stockholders*; strangers dealing with the corporation are protected in such case. *Kent v. Quicksilver Co.*, 4, 47; compare *McCullough v. Moss*, 13, 440
127. *Trespass not excused by plaintiff's incapacity to hold the property.*—As between the party despoiled and the wrong-doer, the courts will not enter upon this inquiry. *Cole Co. v. Virginia Co.*, 7, 508

M. Fraud.

128. *Corporation, when a necessary party.*—In a suit against its directors for fraud and mismanagement the corporation is a necessary party either as complainant or defendant. The corporation in itself is the proper party plaintiff, but if the corporation refuse, stockholders may sue, making the company one of the defendants. *Robinson v. Smith*, 3, 448
129. *Good faith required between associates.* *Getty v. Devlin*, 7, 29
130. *Credit mobilier contract to its Directors for the coal supply of the road.* *Wardell v. Union Pac. R. R.*, 7, 144
131. *Purchase by directors at fair public sale: Held, the sales to them were valid.* *Watts' App.*, 8, 222
132. *Contract between corporation and majority stockholders.*—The court will carefully scrutinize, and may refuse to enforce its unjust provisions. *Flint v. Eureka Co.*, 11, 588
133. *Equitable relief against family combination within the corporation.* *Sellers v. Phoenix Co.*, 15, 388

CORPORATIONS. *Continued.*

N. Miscellaneous.

134. *A company is not estopped to deny a lease on account of receipt of royalty where the royalties were not entered as such, but as ores sold. Yellow Jacket Co. v. Stevenson,* 3, 545

135. Knowledge of members of a Board, not knowledge of the Board itself. *Id.*

136. *Corporate bonds are cash to the corporation. Watts' Appeal,* 8, 222

137. *Placer claims worked by same water.*—R., one of the prominent organizers, purchased, with his own money, claims which were to be transferred to a mining company; and also other claims so situated as to prevent the proper working of the company's claims. *Held,* that upon tender, he must convey all such claims to the company even if he had not become finally bound as a subscriber to the company. *Coyote M. Co. v. Ruble,* 4, 88

138. *Misnomer of company defendant.*—Judgment can not be entered against the "Independent Tunnel Company" upon a default against the "Independent Company." *King v. Randlett,* 5, 605

139. *Joint action.*—The action being joint, it was necessary to prove that the money had been received by both defendants. *Simons v. Vulcan Oil Co.,* 6, 624

O. Foreign.

140. *Constitutionality of conditions imposed upon foreign corporations. Utley v. Clark-Gardner M. Co.,* 4, 39

141. *Foreign corporation may sue without filing certificate. Id.*

COSTS.

1. *Costs do not follow the decree, the successful party being blameable. Irwin v. Davidson,* 7, 287; *Welland v. Huber,* 13, 364

2. *Apportionment of costs in equity. Union M. Co. v. Dangberg,* 8, 113

3. *Costs divided, neither party blameless. Coffman v. Robbins,* 8, 131; *Godfrey v. White,* 11, 563

4. *California Statute authorizing insertion of costs in judgment, construed. Antoine Co. v. Ridge Co.,* 10, 97

5. *Insufficient suspensory offer—Costs.*—The solicitors of defendant wrote to the plaintiff's solicitors that they were prepared to advise defendant to settle on certain terms. *Held,* that this should not necessarily free the defendant from liability to the subsequent costs of the action. *Trotter v. Maclean,* 10, 264

6. *Taxing costs in actions for diversion of water.*—In actions for the wrongful diversion of water, the Practice Act of Nevada fully authorizes the taxing of the costs against the party who is in the wrong, irrespective of the amount of damages recovered. *Brown v. Ashley,* 12, 163

7. *Costs, in equity, are discretionary, and ought to be left to the action of the trial court. Hoyt v. Smith,* 12, 326

8. *Costs disallowed to both parties on account of piling up a mass of testimony resulting in failure to prove the respective allegations on account of which it was called. Clegg v. Clegg,* 14, 289

COVENANT.

1. *Incidents annexed to land—Contracts in restraint of trade.*—A covenant by the vendor of real estate that neither he nor his assigns will sell marl from off a tract adjoining the demised premises, will not be enforced in equity against the purchaser of such tract. *Brewer v. Marshall*, 4, 119
2. *Local peculiarities of the action of covenant in Pennsylvania* stated. *Lehigh Co. v. Harlan*, 8, 424
3. *Parol concessions not admissible in "Covenant."*—Evidence of the work done in the faults of the veins was not admissible under the lease where the written consent of the company to its performance had not been obtained. *Id.* 8, 424
4. *Where covenants are apparently variant*, it is necessary to consider the whole instrument, to obtain the intent of the parties. *Rolleston v. New*, 8, 464
5. *Suit on covenant, for use.*—A covenant under seal can be sued only in the name of the covenantee, but where sued on for the use of others, the court will control the execution so as to see the proceeds properly applied. *Ardesco Co. v. North American Co.*, 8, 589

CRIMES.

1. *Closing airway under master's orders.*—Workmen stopping up an airway into an adjoining colliery, by order of their employer claiming the ownership and the right to close it, are not liable under the statute for malicious mischief; otherwise would be the case of doing an act *malum in se*. *Reg. v. James*, 4, 168
2. *Crime committed through second party, who is innocent of intent* is chargeable to the employer. *Reg. v. Bleasdale*, 4, 177
3. *Charging sole corporator, as owner.*—When a corporate ditch is under the control of one who is the sole corporator in the company the property may be laid and proved as the property of such person. *Castleberry v. State*, 4, 224
4. *Pretense of title, without color is no defense.* *Id.*
5. *Accident in mine—Whose duty to report to the inspector.* *Sholl v. People*, 4, 228
6. *Strict construction of penal statutes.* *Deidesheimer, Ex parte*, 8, 42
7. *Arson—Riot.*—The burning of a coal breaker by a band of men who discharge fire-arms and drive away the watchman is a riot. *Lycoming Ins. Co. v. Schwenk*, 8, 58
8. *Violence against laborers accepting under-rate wages.*—Every man has the right to work for the best price he can get; but if others choose to work for less than the usual price, the law will not permit violence to be used against them or their employers. *Rex v. Batt*, 4, 103
9. *Conspiracy to prevent work.*—An indictment for conspiring "to prevent the workmen of J. G. from continuing to work," does not require evidence of conspiracy to prevent *all* the workmen from continuing to work. *Rex v. Bykerdike*, 4, 101
10. *Extortion—Land office.*—The register of the United States land office can not act as an attorney for an applicant for patent and if he

CRIMES. *Continued.*

receive from such applicant a gross sum in part as his official fee, in part as charge for services as an attorney, such receipt of money is extortion. *U. S. v. Waitz*, 4, 205

11. *A combination of workmen* for the purpose of dictating to masters what workmen they shall employ, is indictable. *Rex v. Bykerdike*, 4, 161

12. *Indictment for manslaughter by an engineer's neglect must allege duty and breach.* *Reg. v. Barrett*, 4, 171

13. *An act of omission*, as well as of commission, may be the subject of an indictment for manslaughter. *Reg. v. Lowe*, 4, 180

14. *Insufficient indictment for larceny of ore.*—Failing to allege that it had been converted into personalty. *Peo. v. Williams*, 4, 185

15. *Riot—"Beginning to demolish."*—A party of coal whippers, having malice against a coal lumpers who paid less than the usual wages, riotously went to his inn, began to throw stones and break windows. *Held*, that they might be convicted of "beginning to demolish" the house if it was their intent to demolish it, even although their principal object was to injure the lumpers. *Rex v. Batt*, 4, 162

16. *Larceny—Taking ore from fellow miners' heaps.* *Rex v. Webb*, 4, 166

17. *Stealing coal from many owners by secret mining through common shaft.* *Reg. v. Bleasdale*, 4, 177

18. *Larceny of ore—Time between severance and asportation.*—The severance and asportation of ore must be so separated as not to constitute one continuous act, to constitute the crime of larceny. *Peo. v. Williams*, 4, 185; *State v. Berryman*, 4, 199

19. *Nugget.*—A nugget of gold, separated from the vein by natural causes and found loose upon the surface, is parcel of the realty, and when taken and carried away by one continued act, it is not larceny. *State v. Burt*, 4, 190

20. *Mail carrier embezzling bag of gold dust.* *Farnum v. U. S.* 4, 192

21. *Larceny as bailees by conversion of receipts for oil in store.* *Hutchison v. Com.*, 4, 208

22. *Manslaughter by negligence of duty to ventilate mine.* *Reg. v. Haines*, 4, 174

23. *Other parties' negligence at same time* is no defense in a case of manslaughter. *Id.*

24. *Manslaughter—Deserting the engine or leaving it in the charge of an incompetent person*, causing one of the colliers to be thrown down the shaft and killed: *Held*, that the man so leaving the engine was guilty of manslaughter. *Reg. v. Lowe*, 4, 180

25. *Manslaughter, through neglect.*—It was the duty of the prisoner to place a stage on the mouth of the shaft, and the death was the direct consequence of his negligent omission to perform such duty. *Held*, that defendant was rightly convicted of manslaughter. *Reg. v. Hughes*, 4, 183

26. *Elements of manslaughter, through negligence.*—That which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. *Id.*

CROSS LODGE.

1. *Cross lode need not adverse. Lee v. Stahl,* 16, 153
2. *The crossing of lodes does not mean the crossing of two patents,* but the actual crossing of the two veins themselves. *Id.*

CUSTOM.

1. *Evidence of custom in other mining districts. Dean of Ely v. Warren,* 4, 238; *Brown v. 49 Co.,* 9, 600
2. *Custom and prescription distinguished—Profit a prendre.*—A custom gives a right local to a district or community; prescription is a right attaching to the person or to a particular estate. *Perley v. Langley,* 4, 235
3. *Whether rights are held as a custom or as a prescription depends* upon whether they are held by local usage, or, *contra*, as a personal claim, or as dependent on a particular estate. *Id.*
4. *All rights which may be held under a custom may be held by* prescription, but the reverse of this is not true. *Id.*
5. *A profit in another's land must be established as a prescription* by the individual through his ancestors, or a corporation and its predecessors, or as appurtenant to some estate held by the claimant. *Id.*
6. *There is no precedent for custom to take the soil. Id.*
7. *Workings—Judgment of mine owner not to be questioned.*—It is not within the province of a court to question the judgment of the owner of a mining claim, a local custom so to work having been established. *Stone v. Bumpus,* 4, 278
8. *Custom under Mexican law was allowed not only to control,* limit, modify and interpret the general rules of the system, but even to establish a rule in contravention of the written law; hence, the division of custom without law, custom contrary to law and custom according to law. *Von Schmidt v. Huntington,* 6, 284
9. *Custom in violation of statute.*—Constructive possession of public lands in Nevada can only be had by compliance with the Possessory Act of that State, and no custom of holding lands in direct violation of the statute will be recognized. *Rivers v. Burbank,* 7, 584
10. *Non-residents using local phrases.*—It is not a conclusion of law that words in their contract were used with the local meaning. *Clayton v. Gregson,* 9, 141
11. *The general custom of miners forms a part of a contract for the* working of mines in the absence of express terms or of a private custom of the lessor not known to both parties. *Beatty v. Gregory,* 9, 234
12. *Elements of, and reasonableness of, custom to allow workings* to be idle in certain cases, considered. *Id.*
13. *Custom of miners controls.*—In anomalous cases (*e. g.* upon the question whether quartz broken from the ledge belongs to the lode claim or to a subsequent surface claim located below it). *Brown v. '49 & '56 M. Co.,* 9, 600
14. *Plea of custom, to what date referable.*—A plea that the defendants had done the acts complained of in accordance with the approved practice of mining, must be taken to refer to the practice at

CUSTOM. *Continued.*

the date of the reservation, under which their alleged right accrued.
Smart v. Morton, 13, 655

15. *Covenants control custom.*—A general covenant to work a coal mine according to a certain local custom or the custom of other collieries, is to be limited by the special covenants in the same lease.
Shafto v. Johnson, 15, 203

See DISTRICT RULES.

DAM.

1. *Appropriation by damming.*—A dam across a natural water-course is an actual appropriation of the water at that point, but not below it. *Kelly v. Natoma Co.*, 1, 593

2. *Damnum absque injuria.*—Defendants erected dams at the outlet of certain lakes, resulting in injuries to the plaintiffs, but attempted to justify on the ground that the reservoirs thus created were of great value. *Held*, that if the injuries were trivial they might be considered *damnum absque injuria*; but that the legal superiority of conflicting rights could not be determined by a comparison of their values.
Weaver v. Eureka Co., 1, 642

3. *Nuisance—Instance of mandatory injunction lowering dam.*
Ramsey v. Chandler, 4, 240

4. *Instance of injunction for protection of reservoir.* *Rupley v. Welch*, 4, 243

5. *Deed of water flowing below mill.*—Refers to water after being used by the mill. *Oregon Co. v. Trullenger*, 4, 247

6. *Right to raise dam, as affected by rights of intervening claimants above.* *Nevada Co. v. Powell*, 4, 253

7. *Upper and lower dams—Effect of booming—Damnum absque injuria.*—*Held*, that B, the defendant, builder of lower dam, was not responsible for damages caused plaintiff, owner of upper dam, by the introduction of the booming system at a dam built above both, and subsequent to their construction; that it was a damage resulting only as a remote result of his building the lower dam, and that it was a clear instance of *damnum absque injuria*. *Proctor v. Jennings*, 4, 265

8. *Proof necessary to warrant recovery in an action to recover damages for the erection of a dam, and to abate the same as a nuisance.*
Stone v. Bumpus, 4, 271

9. *Injunction—Dam to stop tailings.*—A court does not abuse its discretion by refusing an injunction to restrain parties from building a dam on their own mining ground, to prevent injury to it by the flow of tailings from other ground. *Nelson v. O'Neal*, 4, 275

10. *Injuries from breaking dam.*—If a dam constructed in a good and workmanlike manner, and used with reasonable care, breaks at a high stage of water and injures mining claims below, the owners of the dam are not liable for the damages. *Everett v. Hydraulic Co.*, 4, 589

11. *Interruption of flow of water.*—The prior appropriator of water may recover damages for an irregular flow of water in his ditch caused by a dam erected on the creek above the head of his ditch if the injury sustained is not a mere temporary or trivial one. *Natoma Co. v. McCoy*, 4, 590

DAM. Continued.

12. *Duties of dam owner.*—The owner of a dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors. *Fraler v. Sears Co.*, 12, 98
13. *An upper owner may dam against water, "the common enemy,"* only he may not gather water which, but for such means, would never have come to the mine below. *Jones v. Robertson*, 15, 708
14. *A bull-head not a nuisance.*—Defendant could not be liable unless the dam were a nuisance *per se* at the outstart. *Id.*

DEBT.

1. *Debt lies whenever the obligation is to pay a sum certain, or* which may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute. *Union Co. v. Pierce*, 12, 19

DEFAULT.

1. *Damages not being prayed for can not be assessed on default.* *Pittsburgh Co. v. Greenwood*, 12, 128
2. *Reliance upon third parties* is no defense in a motion to set aside a default. *Kuhn v. McAllister*, 14, 512
3. *A default at time of final judgment* against co-defendants who fail to plead, is not ill-taken nor too late. *Pardee v. Murray*, 15, 515; *Manville v. Parks*, 15, 566

DELIVERY.

1. *Sale of timber—Measurement—Title.*—Where an amount of timber was identified and sold at a given price per foot, and put under the control and subject to the direction of the purchaser, it was held the sale was complete. *Adams Co. v. Senter*, 1, 241
2. *Subsequent notice* could not revoke such sale. *Id.*
3. *Sale, when complete—Intention.*—Where it is clear, by the terms of a contract, that parties intend that a sale shall be complete before the article sold is weighed or measured, the property will pass before this is done. *Boswell v. Green*, 2, 363
4. *The term "immediate delivery" defined.* *Neldon v. Smith*, 2, 371
5. *Delivery of oil.*—Upon contract to deliver oil barrels on board of boats "preparatory to running out on the first water," the barrels to be paid for on delivery: *Held.* that the vendor was bound to load the barrels, or at least to notify the purchaser of his readiness to load them. *Cullum v. Wagstaff*, 2, 578
6. *Oil burning during delivery—Loss on vendor.* *Rochester Co. v. Hughey*, 4, 282
7. *Idem—Control of barges during delivery.*—Evidence that by the custom of the trade at the place of delivery the barges to receive the oil were, during the delivery, in the custody and control of the purchaser, was properly rejected as not aiding the fact of delivery. *Id.*
8. *Levy by creditors of vendor on coal loaded on barges under contract to sell;* delivery held not complete and levy sustained. *Sneathen v. Grubbs*, 4, 286
9. *Constructive delivery.*—In order to substitute an arrangement between parties for a manual delivery of a parcel of property, mixed

DELIVERY. *Continued.*

with an ascertained larger quantity, the portion sold must be so clearly defined that the purchaser can take it, or maintain replevin for it. *Foot v. Marsh*, 10, 185

10. *Non-assent to delivery.*—A mere demand for the payment of the balance of purchase money can not be regarded as an acquiescence in the wrongful delivery of an escrow, and as depriving the vendor of his right to rescind. *Hamill v. Thompson*, 14, 686

DEMAND.

1. *Omission to aver, cured by verdict.* *Rodgers v. Love*, 2, 474

2. *Demand in cases of election.*—When there is an election to be made as to the thing to be received in payment, there must always be a demand. *Myers v. South Feather Co.*, 2, 541

3. *Waiving time of, without waiving right to, demand.* *Scott v. Kittanning Co.*, 3, 159

4. *The distinction between a modus and a suspensive potestative condition* (civil law terms) stated. *Escoubas v. Louisiana Co.*, 12, 343

5. *Action for specific performance—Previous demand a matter of costs.*—Where a person has a right to a specific performance, such right depending upon the contract and not upon a breach of it, a demand of performance before suit brought is only important in reference to the costs of the action and has no other bearing. *Welland v. Huber*, 13, 364

DEPOSITION.

1. *Loose exhibit.*—A paper, found pinned to a deposition, not referred to in or about the deposition, and not aided by parol testimony, is not an exhibit so identified as to be admissible. *Susquehanna Co. v. Quick*, 1, 201

2. *Release to witness.*—But such paper being a release of warranty to the witness, being otherwise proved, is admissible, independent of the deposition. *Id.*

3. *Discretion.*—Plaintiff's attorneys offered several objections to depositions, based upon the fact that a copy of the order of the judge for taking the depositions, upon which they had acknowledged service in writing, was not a perfect copy, in that it did not mention the notice to be given. But the objection was overruled. *Held*, that the court properly exercised its discretion. *Attwood v. Fricot*, 2, 305

4. *Reasonable notice should be given* to a party, of the time and place of taking testimony; but what is reasonable notice depends upon the particular circumstances. *Id.*

5. *De bene esse.*—Though depositions taken *de bene esse* are irregular, yet at the hearing of the cause it is too late to make objection on that ground. *Ely v. Warren*, 4, 233

6. *Signed without reading.*—Deponents can not waive the reading of their depositions before signing them; depositions so signed are inadmissible in evidence. *Godfrey v. White*, 11, 563

7. *In narrative form.*—A deposition under the California statute, taken in narrative form, will be sustained. *Pralus v. Pacific Co.*, 12, 478

DEPOSITION. *Continued.*

8. *Single certificate to depositions of several witnesses allowed.* *Id.*

9. *Use of depositions on appeal.*—Depositions filed but not preserved on the record, in a chancery cause, can not be used before the Supreme Court, on the trial of an appeal from the decree of the Circuit Court. *Bean v. Valle*, 13, 292

10. *Waiver of objections to deposition.*—Although an exhibit to a deposition is objected to when produced by the witness, and the objection is noted in the deposition, yet, if the objection is not renewed at the trial it will not be considered on appeal. *Parrott v. Byers*, 13, 506

11. *A commission to take a deposition*, issued in accordance with a previous order of the court, attested by the certificate of the clerk and under the seal of the court, is in compliance with the statute. *Smith v. North Am. Co.*, 13, 599

DESCRIPTION.

1. *Construction of lease or deed is the duty of the court and not of the jury.* *Kamphouse v. Gaffner*, 2, 258

2. *Timber—Privilege extended by parol examination of the description.* *Snodgrass v. Ward*, 4, 806

3. *Vague entry, insufficient—Notice.*—An entry so vague that it affords no notice to a second enterer, who both surveys and pays before the first entry is made sufficiently specific, is void as to such subsequent entry. *Johnston v. Shelton*, 4, 808

4. *Insufficient description.*—An entry of "640 acres beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's Bear-pen on the Hogback mountain and running various courses, for complement," is in itself too vague and indefinite; it would amount to a floating right. *Id.*

5. *An entry must amount to notice.* *Id.*

6. *Mistake in course of vein.*—A misdescription in the posted notice of a claimant of a quartz lode, calling for the vein in a southwesterly direction, when, in fact, the vein, as afterward ascertained, ran nearly due south, the lode being under ground and undeveloped, will not vitiate the claim. The thing intended to be taken up was the vein, and its exact direction could not, of course, be ascertained or accurately described until the vein was followed up or explored. *Johnson v. Parks*, 4, 816

7. *Latent ambiguity solved by jury.*—Where the lease described what was let by the lessors as their "coal-bank and the appurtenances thereunto belonging," and did not otherwise describe the premises leased, nor the boundaries—in an action for the rent reserved, in which eviction is set up as a defense, it is for the jury and not for the court to say what was the extent of the demise, it being rather a latent ambiguity to be solved, than an instrument of writing to be construed. *Tiley v. Moyers*, 4, 320

8. *False description rejected as surplusage.* *Reed v. Spicer*, 4, 330

9. *Sufficient description for assessment purposes.*—Where the assessment called for "one mine of four thousand and four hundred

DESCRIPTION. *Continued.*

feet on Last Chance Hill," it is a sufficient description of the possessory right for the purposes of taxation. *Nevada v. Real del Monte Co.*, 4, 334

10. *Variance—Consolidated claims one mine.*—Where the complaint filed to enforce such assessment enlarged the description so that it read, "those certain mining claims situate on Last Chance Hill in said county known as the Real del Monte, Aurora, Last Chance, * * containing in all 4,400 feet, more or less, and being the same property described in the assessment," there is no variance between the two descriptions. Where many claims are consolidated in the hands of one company there is no impropriety in calling it one mining claim. *Id.*, 4, 235

11. *The words "Pocotillo Mine," in a mortgage, construed.* *Brandow v. Pocotillo M. Co.*, 4, 337

12. *Description limited to the mine so known at time of contract.* *Id.*

13. *Sufficient certainty.*—Where the description in the writ of ejectment was for a certain limestone quarry, containing about three acres, and bounded on two sides by adjoiners, a verdict for the quarry, describing the two boundaries, would have been sufficiently certain. *Clement v. Youngman*, 5, 281

14. *Vague prior entry sustained, the later definite entry having full notice.* *Allen v. Gilreath*, 6, 470

15. *Description in preliminary contract.*—Defendant agreed to take a lease of "those two seams of coal known as the two feet coal and the three feet coal, lying under lands to be hereafter defined, in the Bank End estate." *Held*, that the contract was sufficiently definite to be enforced, and that its true construction was that the bounds, not of the seams, but of the estate, were to be in the lease. *Haywood v. Cope*, 6, 499

16. *Identity of mines shown by parol.*—Where there is a grant of mines under farms, the identity of the mines is a question of fact, and may be decided by evidence *dehors* the deed. *Field v. Beaumont*, 7, 257

17. *Sufficient description of quartz mill.*—A lien notice describing the property as a "quartz mill, being at or near the town of Scottsville, in Amador county, known as Moore's New Quartz Mill," *held*, sufficient, there being no evidence of any other mill at that place so designated. *Tibbetts v. Moore*, 9, 348

18. *Description in mortgage may be aided by parol identification.* *Hancock v. Watson*, 10, 546

19. *A grammatical construction is not always to be followed, but that construction is always to be adopted which will accomplish the object for which the instrument was executed.* *Id.*

20. *Description of bar placer claims, giving name of claim and adjoining claim, size and location in canyon.* *Held*, sufficient. *Grady v. Early*, 12, 104

21. *Uncertainty in description.*—The following description: "All my interest in real estate, easements and rights to dig and mine coal

DESCRIPTION. *Continued.*

in Mahoning county, Ohio, conveyed to me, and now owned, held and enjoyed by me from William Buchanan," is sufficiently certain and parol evidence will be admitted to identify the property. *Stambaugh v. Smith*, 15, 82

23. *Identification of patented premises.*—It is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void. *Cullacott v. Cash Co.*, 15, 392

23. *Sufficiency of description in notice.*—A notice of location of a mining claim distinctly marked upon the ground, describing the west-end corners as marked by pine trees, while it appears that they were in reality marked by stakes, the notice, however, referring to a permanent monument, to wit, "the Gambetta lode claim on the east," contains a sufficient description. *Upton v. Larkin*, 15, 404

24. *Description required by statute.*—The Federal and the State law are substantially the same in requiring that the location certificate of a mining claim must contain such a description as will identify the claim with reasonable certainty. *Drummond v. Long*, 15, 510

See BOUNDARIES; LOCATION CERTIFICATE.

DEVISE.

1. *Construction on cross-remainders—The half-blood excluded.* *Irwin v. Covode*, 15, 120

DILIGENCE.

1. *Sickness and want of means no excuse for delay.* *Ophir Co. v. Carpenter*, 4, 640

2. *Due diligence defined.* *Id.*

3. *Want of diligence in making motion.*—For example: When the demurrer of defendant was overruled more than six months before he moved to be allowed to answer. *Kuhn v. McAllister*, 14, 512

DIP.

1. *The lines of a location should be parallel with the top of the lode,* and if the line of the lode departs from the surface lines of the location, the locator takes no part that lies without such surface lines; but if the lode in its downward course into the earth departs from the lines upon the side, the locator takes that part also. *Stevens v. Williams*, 1, 557

2. *Locator may follow dip of lode.* *Iron Co. v. Murphy*, 1, 548; *Wolfley v. Lebanon Co.*, 13, 282

3. *Following vein.*—Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein in its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, on any degree, until it reaches the horizontal. *Stevens v. Williams*, 1, 566

4. *A lode which has an inclination of more than forty-five degrees from the vertical departs from the perpendicular, and it is merely a*

DIP. *Continued.*

verbal distinction to say that such a lode departs from the horizontal plane. *Stevens v. Williams*, 1, 557; *Leadville Co. v. Fitzgerald*, 4, 880

5. *The burden of proof* is upon the plaintiffs (claiming the right of dip beyond their lines) both because they are the plaintiffs, and because they are seeking to go out of their own territory into that claimed by others. *Stevens v. Gill*, 1, 576. They are *prima facie* trespassers. *Cheesman v. Shreve*, 16, 79

6. *Veins which unite, but do not cross* each other, are within the exception of Section 2336 when they unite on the "dip," or in their downward course; but not when they unite on the "strike," or on their horizontal extension. The word "below," in Section 2336, does not mean "beyond." *Lee v. Stahl*, 16, 152

7. *Patent for land is subject to dip of adjoiner*.—Under Rev. St. U. S., Sec. 2322. *Cheesman v. Hart*, 16, 263

8. *The exception in favor of the proprietor of veins or lodes dipping* underneath the land granted, construed to be an exception in favor of the proprietors only of lodes located before the patent issued. *Pacific C. Co. v. Spargo*, 16, 75

9. *The dip right a Federal question*. *Cheesman v. Shreve*, 16, 79

10. *Triangle shaped claim*. *Montana Co. v. Clark*, 16, 80

11. *Vein within lines extended downward vertically but its apex outside*. *Id.*

12. *Patent not conclusive as to vein below point of union*. *Champion Co. v. Wyoming Co.*, 16, 145

13. *Following lode beyond side lines*.—One who seeks to establish a right to pursue his lode beyond its side lines must be able to show that the lode is continuous and in place throughout its whole course, from its origin in his own ground, to the place beyond in which he claims it. *Leadville Co. v. Fitzgerald*, 4, 390

14. *Ancillary or side veins may follow the dip same as main vein*. *Jupiter Co. v. Bodie Co.*, 4, 412

15. *Dip as affecting drainage between adjoining owners*.—Adjoining owners on the same level of the same vein, owe no special duty to each other. *Philadelphia Co. v. Taylor*, 5, 133

16. *But easements purchased by the lower mine can not be drowned out*. *Id.*

17. *Location must cover vein, dip excepted*. *McCormick v. Varnes*, 9, 506

18. *Trespasser tapping lode on the dip*.—A locator working subterraneously into the dip of the vein belonging to another locator who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom. *Flagstaff Co. v. Tarbet*, 9, 607

19. *An agreed line between claimants on the same lode must be carried downward in the same way*. *Eureka Co. v. Richmond Co.*, 9, 579

20. *Admissions as to supposed course or dip of an undeveloped lode* are not (estopping) evidence. *Pardee v. Murray*, 15, 515

21. *Possession of the surface gives (constructively) possession of all veins apexing within the surface lines, including such parts of veins as extend on the dip beyond such lines*. *Id.*

DISCOVERY—DISCOVERY SHAFT.

1. *Veins can only be discovered on public lands. Golden Terra Co. v. Mahler*, 4, 890; *Armstrong v. Lower*, 15, 631
2. *Discovery after location made.*—But if such party afterward discovers a vein upon that portion of the second location which is exclusive of the first, the staking, recording and improving will inure to his benefit, and the validity of the location will date from the time of such discovery. The order of the acts to be performed is non-essential, provided no intervening rights of others have accrued. *Golden T. Co. v. Mahler*, 4, 890
See § 14.
3. *Pay ore not essential to discovery.*—A vein is discovered when there is disclosed a well-defined body of rock in place carrying gold. *Id.* 4, 890
4. *No rights can be acquired by location, before the discovery of a vein or lode within the limits of the claim located. Jupiter Co. v. Bodie Co.*, 4, 411
5. *Locator need not be discoverer*, but it must be known and claimed by him in order to give validity to his location. *Id.*
6. *Discovery notice holds the claim pending location—Constructive possession. Erhardt v. Boaro*, 4, 432
7. *Notice—How made.*—A notice posted at the point of discovery, specifying the nature and extent of his claim, will protect the locator's right for the time allowed by law in which to complete the location, although he may be absent from the claim during part of such time. *Erhardt v. Boaro*, 4, 434
8. *Same—Must specify extent of claim.*—But if he fails to specify in his notice of discovery and claim to the ground, the extent of his claim—as that it extends a certain distance from the point of discovery in a direction named, it will relate only to the place where it stands. As against others afterward locating in the vicinity, it will cover only ground necessary for sinking a shaft. *Id.*
9. *Prerequisites to location—Discovery outside of discovery shaft not available. Van Zandt v. Argentine Co.*, 4, 441
10. *The burden is on the plaintiff to establish the fact that ore was so found in his discovery shaft, and that the same lode is continuous to the ground in controversy. Id.*
11. *Discovery shaft required on each claim.*—Where a number of persons take up 1,500 feet upon a lode, dividing the same into parcels held in severalty, the sinking of a shaft upon one of such several claims is not sufficient to perfect title to the entire portion so located in parcels. *Zeckendorf v. Hutchinson*, 9, 483
12. *Rights of discoverer in possession.*—One in actual possession having uncovered the lode, though failing to file upon the claim as required by law, can not be ousted by a subsequent discoverer, as to the ground actually held. *Faxon v. Barnard*, 9, 516
13. *Mineral must be discovered before location. North Noonday Co. v. Orient Co.*, 9, 529
14. *Mineral discovered after location.*—But if a location otherwise valid should be made and the vein afterward discovered, no other

DISCOVERY—DISCOVERY SHAFT—*Continued.*

party intervening, the location would be valid to the limits of the claim. *North Noonday Co. v. Orient Co.*, 9, 529; *Zollars v. Evans*, 4, 407; *Jupiter Co. v. Bodie Co.*, 4, 411

15. *Evidence of custom relating to discovery is inadmissible, unless the question or the accompanying statement of counsel discloses the custom proposed to be proved, so that the court can see its relevancy.* *Ecker v. Moore*, 12, 686

16. *If discoverer is alleged to have waived his rights such allegation must be proved by a preponderance of evidence.* *Smith v. North American Co.*, 13, 599

17. *Right to veins intersected in tunnel, dependent on discovery.* *Corning Tunnel Co. v. Pell*, 14, 612

18. *Sufficient instruction as to discovery.*—An instruction that "to make a valid location of a lode mining claim, there must be a discovery within the limits of the claim, of a vein * * * containing gold, silver, or other valuable mineral deposits, * * *" is proper, when taken in connection with other instructions defining and limiting what is meant by a "discovery." *Upton v. Larkin*, 15, 404

19. *Discovery and appropriation are recognized as sources of title to mining claims; and development by working as the condition of continued ownership, until a patent is obtained.* *Erhardt v. Boaro*, 15, 478

20. *Prospector protected pending complete location.* *Id.*

21. *Discovery and discovery shaft distinguished.* *Armstrong v. Lower*, 15, 631

22. *Where the position of a discovery becomes material, as to whether made on or off patented ground, it is for the proper party to prove where it was made and the answering party afterward to show, if they can, that it is on such ground; the examination should not be interrupted to prove at that stage the existence of the patent.* *Upton v. Larkin*, 15, 404

23. *Discovery shaft on the line of an older claim, and thus partly on and partly off clear ground, will sustain a location.* *Id.*

24. *Effect of patenting the discovery shaft to third party.* *Gwillim v. Donnellan*, 15, 482

25. *The patenting of the ground of a claim which includes its discovery shaft to an adverse location avoids the entire claim.* *Id.*

See LOCATION.

DISTRICT RULES.

1. *The courts will not inquire into the regularity of district rules.* *Gore v. McBrayer*, 1, 645

2. *Continued observance.*—To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated. *Oreamuno v. Uncle Sam Co.*, 1, 32

3. *Judicial recognition—Appropriation.*—The mining laws when once established and recognized by the courts (and in Nevada by statute), have the force and obligation of legislative enactments, and

DISTRICT RULES. *Continued.*

where courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. *Mallett v. Uncle Sam Co.*, 1, 17

4. *Location and right of continued possession must be in strict accordance with district laws, if there are any on the subject, and a failure might work a forfeiture of the ground. Id.*

5. *District organization not essential. Golden Fleece Co. v. Cable Co.*, 1, 120

6. *Must not conflict.*—The rules and customs of miners must not conflict with the laws of the United States, or the laws of the State in which the claims are located. *Jupiter Co. v. Bodie Co.*, 4, 411; *McCormick v. Varnes*, 9, 505

7. *District rule may exist in parol. Jupiter Co. v. Bodie Co.*, 4, 411

8. *Mining regulations as evidence—Affecting vested rights.*—In a suit for the possession of mining claims, the defendant was allowed to read in evidence the mining rules of the district, though adopted after the plaintiff's right had attached. *Held*, that as defendants claimed under the rules, they were competent for the purpose of determining the nature and extent of their claim, and their effect upon pre-existing rights was sufficiently guarded by the instructions. *Roach v. Gray*, 4, 450

9. *Appropriation limited.*—The mining rules of a district may limit the quantity of ground which a party can acquire by location or prior appropriation. *Prosser v. Parks*, 4, 452

10. *Right to purchase unlimited.*—Such rules can not limit the quantity of ground he may acquire by purchase. *Id.*

11. *Usage and custom confined to the district.*—Questions affecting a mining right should be solved according to the customs and usages of the bar or diggings embracing the claim, *whether written or unwritten. Morton v. Solambo Co.*, 4, 453

12. *Mining customs—Conditions, precedent and subsequent—Forfeiture.*—The mining customs of any particular mining district are the common law of mining. Compliance with customs which point out the manner of locating mining ground, is a condition precedent, and the regulations which require that so much work must be performed upon each claim are conditions subsequent, which must be complied with, or the claim forfeited to the United States. It is not necessary that the law should provide in terms for such forfeiture. *King v. Edwards*, 4, 480

13. *The customs of an outside district can not be introduced to vary them. Id.*

14. *Written law presumed in force—Contrary custom may be shown. Id.*

15. *Change of boundaries.*—The boundaries of a mining district may be changed, but such change can not interfere with rights vested under district rules existing before the change. *Id.*

16. *Customs must be reasonable—Representation by work on flume*

DISTRICT RULES. *Continued.*

in another district.—All mining customs must be reasonable, and where it appears that mining ground could not be profitably worked without going outside the district to run a bed-rock flume to it, a custom which would require work to be done in the district to represent it, might be considered unreasonable. *Id.*

17. *Labor on claim or location.*—The local laws of White Pine district, which require two days' work for every location, do not mean two days' work for each two hundred feet, but for the entire mining claim, irrespective of the number of locators or feet. *Leet v. John Dare M. Co.*, 4, 487

18. *No distinction between written and unwritten customs.* *Harvey v. Ryan*, 4, 490

19. *Become void by non-user.* *Id.*

20. *Proof of location notice required by unwritten rule.*—It is error to reject proof of a parol custom requiring a location notice, although such notice was not required by the written rules. *Id.*

21. *A district rule must not only be established, but must remain in force*, and whether it be in force or has fallen into disuse is a question of fact for the jury. *Harvey v. Ryan*, 4, 491; *Jupiter Co. v. Bodie Co.*, 4, 411; *North Noonday Co. v. Orient Co.*, 9, 529

22. *Evidence—The district books—Montana practice.*—The book containing the mining laws of a district is competent evidence under § 504 of the Montana Practice Act. And under § 207 of the same act, the book was rightfully taken by the jury to the jury room. *Orr v. Haskell*, 4, 493

23. *Mining rules, their history and character.*—The history and nature of miners' laws and customs stated and explained. *Jennison v. Kirk*, 4, 504

24. *Statutory law controls local customs.* *Barnes v. Sabron*, 4, 673

25. *Parol evidence of district rules.*—Parol evidence of mining customs can not be received when there are written rules in force on the same subject. *Ralston v. Plowman*, 5, 160

26. *Legality of mining customs a question for the court.* *Id.*

27. *Custom at variance with general law.*—The rights of a party to a mining claim which are fixed by the general law of the land can not be divested by any mere neighborhood custom or regulation. *Waring v. Crow*, 5, 205

28. *Customs proved though not pleaded.*—In a suit in ejectment for a mining claim, proof of the mining rules and customs which tends to support the plaintiff's title may be given in evidence, though such rules and customs are not pleaded. *Colman v. Clements*, 5, 247

29. *Parol and written proof of mining rules.*—A motion to strike out parol proof of mining customs was properly refused when it appeared that the written rules afterward proved were of doubtful force at the time they were sought to be applied to the facts of the case. There was no impropriety in leaving both the parol and written evidence to the jury. *Id.*

30. *Mining rule construed—Forfeiture.*—The word "claim" in the following mining rule—"There shall be one day's work done on each

DISTRICT RULES. *Continued.*

claim every thirty days from the first of May until the first of December in each year," construed to include all kinds of claims, joint as well as separate, and the rule applied, that parties claiming forfeiture under the law must show that the case comes within the strict letter of the rule. *Id.*

81. *Query, as to retroactive district rules.*—The mode of acquiring, and the extent of a claim, may be settled by district rules, but *query*—to what extent can the adoption of new rules, or the abrogation of old ones, affect title once acquired? *Dutch Flat Co. v. Mooney*, 6, 303

82. *The reserving clauses in the act as to "regulations" to be prescribed, and "local customs" explained and restricted.* *Robertson v. Smith*, 7, 196

83. *The district rules must be complied with when not in conflict with the mining acts of Congress.* *Gleeson v. Martin White Co.*, 9, 429

84. *Distinction between local and general mining custom.*—Upon the question of the reasonable size of a mining claim a general custom may be shown, whether prior to or later than the location; but a local rule stands upon a different footing and can not be introduced to affect the validity of a claim acquired previous to its establishment. *Table Mountain Co. v. Stranahan*, 9, 457

85. *Judicial notice can not be taken of the rules, usages and customs of mining districts.* *Sullivan v. Hense*, 9, 487

86. *Whether a mining custom remains in force is a question of fact for the jury;* having been adopted, a presumption would arise in its favor, but parol proof that it was generally disregarded would show that it was no longer in force. *Jupiter Co. v. Bodie Co.*, 4, 411; *North Noonday Co. v. Orient Co.*, 9, 529; *King v. Edwards*, 4, 480

87. *Local records as evidence.*—While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or only evidence of the priority or extent of a party's actual possession. *Campbell v. Rankin*, 12, 257

88. *District rules may be shown to be in force by custom or usage,* without proof of their adoption at a miners' meeting, or a written record thereof. *Flaherty v. Gwinn*, 12, 605

89. *District rule must bind all.* *Id.*

40. *Must be specific.*—District rules imposing conditions upon miners in addition to those imposed by the statutes of the United States, must be clear and positive in their character, not resting upon inference or presumption. *Id.*

41. *District rules not required to have the age of common law customs.* *Smith v. North Am. M. Co.*, 13, 599

42. *A corporation may be represented by its officer or agent at any meeting of miners* called together to frame rules and regulations in their mining district. *McKinley v. Wheeler*, 16, 65

43. *District rules, how proved.*—The book or a copy admissible. *St. John v. Kidd*, 4, 455; *Roberts v. Wilson*, 4, 498; *English v. Johnson*, 12, 203

DITCH.

1. *Location of ditch—Relation.*—Where parties projecting a ditch

DITCH. *Continued.*

give notice in the usual manner, designate the line of the ditch by the usual marks, and prosecute work with reasonable diligence until the same is ready to receive water, they are entitled to such water as against all intervening or subsequent claimants. The title to water conveyed through a ditch constructed in the usual manner, and completed with reasonable diligence, relates, on completion, to the first act of appropriation. *Kimball v. Gearhart*, 1, 615

2. *Due diligence, what is.*—Local circumstances considered. *Id.*

3. *A ditch built for drainage only is not an appropriation of the water.* *Maeris v. Bicknell*, 1, 601

4. *A change in the use of water from one mining locality to another by the extension of the ditch, or the construction of branches, would not affect the prior right of the appropriation.* *Id.*

5. *Evidence of sale of ditch.*—The sale of a ditch can not be proved by oral testimony, but only by deed. *Smith v. O'Hara*, 1, 671

6. *Attempt of lower claim to appropriate water from the flume of the claim above; points in such case considered.* *Correa v. Frieas*, 2, 336

7. *Mortgage of flume—Indivisibility—In the nature of real estate.* *Union Co. v. Murphy's Flat Co.*, 3, 488

8. *A ditch includes its dams.* *Castleberry v. State*, 4, 224

9. *Right of way in ditch the same as the ditch itself.* *Reed v. Spicer*, 4, 330

10. *Act of Congress of July 26, 1866, construed—Local customs applied to water rights and rights of way.* *Jennison v. Kirk*, 4, 564

11. *Water rights a corporeal privilege.* *Hill v. Newman*, 4, 513

12. *Relations to the fee.*—The right to water may exist without ownership of the soil over which it flows. *Id.*

13. *Ditch across ranch claim.*—A miner has no right to work within the inclosure surrounding a dwelling house, corral and other improvements of another. *Burdge v. Underwood*, 4, 518

14. *Ravine used as ditch bed.*—A ditch owner may use a ravine as a connecting link between different portions of his ditch, and the fact that the water, which at times flowed naturally into the ravine, had been previously appropriated by others, would not deprive him of this right; the appropriation of the water does not carry with it the exclusive use of the bed of the stream. *Hoffman v. Stone*, 4, 520

15. *Enlargement of ditch.*—Defendants were not limited to the quantity of water they had turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch, it was not capable of carrying more water than was then diverted. *White v. Todd's Valley Water Co.*, 4, 526

16. *If by reason of obstructions or irregularity in grade, it was not capable of conveying as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove the obstructions, and then might fill the ditch to its capacity. But a failure for an unreasonable length of time to remove the obstructions or adjust the grade and to divert more water through their ditch, would limit them to the amount first diverted.* *Id.*

DITCH. *Continued.*

17. *Diversion of water from choked ditch.* *Brown v. Smith*, 4, 539

18. *Ditch, not a building or superstructure under the Mechanic's Lien Law.* *Ellison v. Jackson Water Co.*, 4, 559

19. *Injury to ditch occasioned by hydraulics.* *Jennison v. Kirk*, 4, 504

20. *Injuries from overflow.*—The owner of a ditch is bound to keep it in repair so that it will not overflow or break through its banks to the injury of lands of other parties. *Richardson v. Kier*, 4, 612

21. *Where a natural ravine is adopted as part of a ditch*, the ditch owner is not responsible for an overflow of the water naturally running in such ravine. He adopts such natural watercourse only to the extent of the flow of his ditch, and is only responsible for the overflow of the water resulting from his use of the ravine for the purposes of a ditch. *Id.*

22. *Evidence of value of ditch—Measure of damages for filling up.* *Clark v. Willett*, 4, 623

23. *Rights of ditch on public lands.*—The Mining Act of Congress of July 26, 1866, operated as a grant of the right of way and of the ditch, where a right to the use of water such as was "recognized and acknowledged by the local customs, laws and decisions of courts," had been acquired at the date of its passage; and the subsequent grantees of the United States take subject to the easement. *Broder v. Natoma Co.*, 4, 670

24. *The Nevada ditch statute construed.* *Barnes v. Sabron*, 4, 678

25. *Reasonable use—Ditch not used to its full capacity.*—What amounts to a reasonable use depends upon the circumstances of each case, but a party who constructs ditches carrying a greater quantity should not be confined to the amount of water used by him the first and second years after his appropriation, nor his rights regulated by the number of acres he then cultivated; the object in view at the time of his diversion of the water is to be considered in connection with the actual extent of his appropriation by such ditches. *Id.*

26. *Findings as to capacity of ditch.*—Where a finding as to the capacity of a ditch is based on its being of a certain size and grade, and though its size is proved, there is no sufficient proof of its grade: *Held*, that the finding should be set aside and a new trial granted. *Ophir M. Co. v. Carpenter*, 4, 653

27. *Relation of upper and lower sections of ditch* considered with regard to rulings of other courts concerning the same ditch. *Reynolds v. Hosmer*, 5, 6

28. *Ditch across lands of both parties for mutual accommodation—Executed parol license.*—Plaintiffs and defendants constructed a ditch from the tail-race of the Nevada Land and Mining Company, across the lands of the defendants and plaintiffs respectively, for their joint use in the conveyance of such quantity of water as each of them might purchase from the said company; the defendants diverted the water and deprived plaintiffs of its use. *Held*, that these facts established an executed parol license in favor of the plaintiffs, which supplied the place of a writing and took the case out of the Statute of

DITCH. *Continued.*

Frauds, and entitled them to an interest in said ditch and to damages for the diversion of the water. *Gooch v. Sullivan*, 5, 15

29. *Private water ditch enjoyed in common*, does not cease to be private property because the several persons interested in it have not accurately defined their rights therein, or in the waters flowing in it, nor because they have, by election, selected a person to distribute the water among those who have contributed to the construction and maintenance of the ditch, nor for both of those reasons combined. *Cate v. Sanford*, 8, 124

30. *Idem—No dedication presumed.*—Such a mode of construction and management of a ditch and its waters, although the irrigators may be numerous, does not operate as a dedication thereof to the public. *Id.*

31. *Statute concerning water commissioners, construed. Id.*

32. *Notice of ditches—A party purchasing land with water thereon* distributed by ditches, will be presumed to have purchased with knowledge of how the water was divided. *Coffman v. Robbins*, 8, 131

33. *A ditch is real estate.*—Each interest may be sold or incumbered without the consent of the co-proprietors. *Bradley v. Harkness*, 11, 389

34. *Ditch owners are tenants in common. Id.*

35. *Note of ditch company.*—If an unincorporated ditch company authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not. *McConnell v. Denver*, 11, 432

36. *Company contract limited to proceeds of ditch.*—If lumber is furnished a ditch company under the agreement that it is to be paid for out of the proceeds of the ditch of the company, and the proceeds have all been faithfully applied in payment according to the agreement, the person who furnishes it is not entitled to recover the deficiency against the members of the company. *Id.*

37. *Ditch on school lands prior to act of 1866. Natoma Co. v. Bugbey*, 13, 211

38. *Grant of right of way to ditches.*—The act of Congress of July 26, 1866, clearly grants the right of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes. *Hobart v. Ford*, 15, 236; but not to the exclusion of prior right. *Noteware v. Sterns*, 4, 650; *Titcomb v. Kirk*, 5, 10
See FLUME.

DOWER.

1. *Dower is due out of mines wrought during coverture. Stoughton v. Leigh*, 5, 47

2. *But dower is not due out of unopened mines. Id.*

3. *Work for sole use.*—Dowager may work any open mine on land assigned to her, for her own benefit. *Id.*

4. *How assigned.*—Dower may be assigned of mines, either separately or collectively with other lands, by metes and bounds if practicable, otherwise by a proportion of profits, in sundry ways. *Id.*

DOWER. Continued.

5. *Excessive dower assigned by the heir of full age not recoverable; otherwise as to the act of an infant, or dower assigned by the sheriff.* *Id.*
6. *Various methods of allotting dower.*—When a division by metes and bounds is practicable it should be made; otherwise dower may be assigned by allowing an alternate occupancy of the whole, or a share of the profits. *Coates v. Cheever*, 5, 55.
7. *Dowager of quarry not limited to ground actually broken.* *Billings v. Taylor*, 5, 65.
8. *Dower at common law.*—The general doctrine is that the widow is dowerable of mines open or worked during coverture, but not in deposits not opened at all; as to mines once opened, she is not confined to the old approaches. *Lenfers v. Henke*, 5, 67.
9. *Dower in mines opened after coverture but before assignment.* *Id.*
10. *Agreement between heir and dowager who is also co-tenant treated as an assignment of dower.* *Id.*
11. *Statute of Frauds.*—Dower is not created but only ascertained by an assignment or admeasurement thereof, and therefore if assigned by parol, the contract is not within the Statute of Frauds. *Id.*
12. *Contract amounting to assignment of dower.*—Contract between the heir of full age and dowager, giving her a portion of the rents or profits, if fairly made, will bind the heir and all privies in estate. *Id.*
13. *Widow entitled to dower in royalties.* *Hendrix v. McBeth*, 5, 74.
14. *It is not waste for widow to work mines opened by her husband, nor by the heir before assignment of dower.* *Lenfers v. Henke*, 5, 68.
15. *Dower in estate held in trust for husband.* *Stewart v. Chadwick*, 13, 237.

DRAINAGE.

1. *Servitude of lower mine.*—The owner of a mine at the higher level has a right to work his whole mine, in the manner usual and proper for getting out the minerals, and is not liable for any water which flows by gravitation into the adjoining mine from works so conducted. But he has no right, by pumping or otherwise, to be an active agent in sending water from his mine into the adjoining mine. *Baird v. Williamson*, 4, 368; *Philadelphia Co. v. Taylor*, 5, 188.
2. *Responsibility arising from tampering with natural course of stream.* *Fletcher v. Smith*, 5, 78.
3. *Circumstances which will create liability in such a case.* *Id.*
4. *Working across boundaries on the dip into lower mine.*—The owner of a coal mine excavated to his boundary as he had the right to do, but continued the excavation wrongfully beyond the boundary into the neighboring mine, leaving an aperture in the coal of that mine through which the water passed. *Held*, that the defendant was liable for the original trespass in breaking into the mine, but not in an action on the case for omitting to close up the aperture, although a continuing damage resulted from its being unclosed. *Clegg v. Darden*, 5, 88.

DRAINAGE. *Continued.*

5. *Damnum absque injuria*.—A mine owner may not negligently nor maliciously (in violation of the maxim *sic utere tuo*) divert even an unknown subterranean stream; but he may drain, mine or quarry in the course of enjoyment of his own land, though in so doing he interferes with the flowage of water in hidden, unknown, underground channels. *Haldeman v. Bruckhart*, 5, 108

6. *Spring drained by mine*.—A mine owner, who, in due course of mining, taps and drains the underground channels supplying a spring upon adjoining land, without malice or negligence, gives no right of action to the party whose spring is thus destroyed. *Id.*

7. *Anticipated pollution from mine drainage not enjoined*. *New Boston Co. v. Pottsville Co.*, 5, 118

8. *Upper mine must drain to surface if practicable*. *Locust Mt. Co. v. Gorrell*, 5, 129

9. *Barriers*.—The owner of the subjacent level owes a servitude, and must leave a pillar of coal to support the gangway and keep out the water from the level above. *Philadelphia Co. v. Taylor*, 5, 183

10. *Statutory bounty on drainage*.—The statute of Iowa allowing to all persons providing drainage for lead mines a royalty of one tenth of all the mineral extracted from the mines benefited, held constitutional. *Ahren v. Dubuque M. Co.*, 5, 144

11. *The principle involved is the same as in cases of party walls and partition fences*, and merely provides compensation for benefits received which ought, *ex æquo et bono*, to be paid for. *Id.*

12. *Abstract right to use of water course—Compelling stream to carry foreign water*. *McCormick v. Horan*, 5, 154

13. *Application of the rule to pumping from quarry—Injunction to prevent obstruction of stream*. *Id.*

14. *Continuing injury after former recovery*. *Clegg v. Dearden*, 5, 89

15. *Mine carrying water from surface into another mine*. *Horner v. Watson*, 14, 1

DUMP.

1. *No right to dump on another's ground*. *Raltson v. Plowman*, 5, 160

2. "Inconvenience" does not amount to "obstruction" in a covenant concerning the deposit of quarry refuse. *Keeler v. Green*, 12, 465

3. *Dump containing ores not demised*. *Erwin's App.*, 16, 91

DURESS.

1. *Moral duress—Voluntary payment*.—The payment of \$9 per car by the V. Coal Company, when they had no other means of conveying their coal to market, was not a voluntary payment, but a kind of moral duress. *Chicago R. R. v. Chicago Coal Co.*, 2, 634

2. *Compromise with a man in jail*, though not at the suit of the party with whom it is made, disfavored, and on the facts in this case, disallowed. *Wilkinson v. Stafford*, 14, 523

3. *Duress, to invalidate a deed*, must be of the person. *Harris v. Tyson*, 14, 635

EASEMENT.

1. *Possession, by the owner of an incorporeal hereditament, is not necessary to be proved.* *Union Co. v. Bliven Co.*, 3, 107
2. *Grant of right to flow tailings.*—The plaintiff conveyed to defendants the right to discharge dirt from their ore washing on his meadow lot. The tailings accumulated and spread so as to flow down upon the plaintiff's pasture lot, which lay below. *Held*, that the damage was an incident to the grant and that defendant was not liable. *Bushnell v. Proprs. Ore Bed*, 3, 258
3. *Incidents to grant.*—A grantor is presumed to convey everything incidental to the enjoyment of the grant, so far as the same may be in his power to yield. *Id.*
4. *Tenant at will has no easement to take soil.* *Ely v. Warren*, 4, 233
5. *Res gestæ—Visible servitudes.*—To give effect to all parts of the instrument, the surrounding circumstances, within the knowledge of the parties, must be considered; the references to the mill show an intent to allow its use to continue, and a purchaser must take with reference to all servitudes visibly attached at the time of sale. *Oregon Co. v. Trullenger*, 4, 247
6. *Implied right of entry to enforce easement.* *Philadelphia Co. v. Taylor*, 5, 134
7. *Right to mine adjoining land is not an "appurtenance" to the land when sold.* *Grubb v. Guilford*, 5, 163
8. *Easement defined.*—An easement is "a liberty, privilege, or advantage which one may have in the lands of another, without profit." *Big Mountain Co.'s Appeal*, 5, 178
9. *Ejectment will not lie for an easement.* *Carnahan v. Brown*, 5, 193
10. *How acquired.*—An easement in land can only be acquired by the consent or acquiescence of the owner. *Thorn v. Sweeney*, 7, 565
11. *Easement to drain lands may not be abused.* *Blaisdell v. Stephens*, 7, 599
12. *An easement can not exist in parol.*—An interest in land, or arising out of it, corporeal or incorporeal, must lie in grant. *Huff v. McCauley*, 9, 268
13. *Essentials of easement.*—It is essential to an easement that there should be both a dominant and servient tenement. *Dark v. Johnston*, 9, 263

See INCORPOREAL HEREDITAMENT.

EJECTMENT.

1. *A first judgment in ejectment is not conclusive against either parties or privies, nor against persons holding easements upon the land.* *Union Co. v. Bliven Co.*, 3, 107
2. *Instructions in ejectment.*—Where in such case the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title. *Busenius v. Coffee*, 5, 214

EJECTMENT, *Continued.*

3. *Pre-emption claimant may show other title.* *Coryell v. Cain*,
5, 236
4. *Rule as to title in third party modified.*—The general rule that the claimant in ejectment must recover upon the strength of his own title has, from the anomalous condition of things arising from the peculiar character of the mining and landed interests of California, been to a certain extent qualified and limited. *Id.*
5. *Ouster—Force—Fraud.*—If a party had the right of entry upon a mining claim, his right is not vitiated by his forcible or fraudulent exercise of such right, and the party whom he ousted can not be restored by ejectment. *Depuy v. Williams*,
5, 251
6. *Practice—Defendant substituted for plaintiff.*—If one of several defendants in a suit in ejectment buy the plaintiff's claim, the controversy as to such defendant is ended, and he may properly be substituted for the plaintiff in prosecuting the suit against the remaining defendants. *Bullion Co. v. Croesus Co.*,
5, 254
7. *Amendment to complaint.*—In such a case the new plaintiff can not so amend his complaint as to include other property than that originally sued for, and which he claimed by a different title. *Id.*
8. *Statute of Limitations as a defense to the amendment.* *Id.*
9. *Judgment for undivided fraction of claim—Duty of sheriff.*—Where one of several tenants in common sues in ejectment for an undivided fraction of a claim and recovers, the law does not authorize the sheriff in entirely expelling the defendants from possession if they are willing to quietly submit to a joint occupancy by the plaintiff with themselves. *Id.*
10. *Tenants in common may sue jointly.* *Id.*
11. *Recovery of blind lode without surface.*—Where suit is brought for a blind lode bounded by walls not found till the depth of about two hundred feet is reached, the lode or ledge only can be recovered, and no part of the surface. *Id.*
12. *Recovery of lode without its hoisting works—Severance.*—The fact that plaintiff recovered a vein or lode gives him no right to hoisting works erected for the purpose of taking ore from that vein, unless he had also recovered the surface on which such hoisting works were erected. *Id.*
13. *Former recovery in ejectment.*—A recovery in ejectment (at common law) is no bar to a subsequent recovery by either party. *Doe v. Banks*,
6, 278
14. *Ejectment by ousted lessee.*—A lessee, out of possession, can not recover in ejectment without showing performance or an offer to perform his covenants. *Kreutz v. McKnight*,
6, 314
15. *Effect of recovery in ejectment as to fixtures.* *Ege v. Kille*,
10, 218
16. *Plaintiff in ejectment may recover less than declared for.* *Halsey v. Martin*,
10, 549
17. *Ouster defined.*—An entry on the land of another, under assertion of title, is an ouster; otherwise a mere trespass. *West v. Lanier*,
12, 184

EJECTMENT. *Continued.*

18. *Where both parties claim under a common source, it is not necessary for plaintiff to trace his title beyond it.* *Turner v. Reynolds*, 12, 190

19. *Possession sufficient against intruder.—Showing a legal title.* *Id.*

20. *In ejectment, plaintiff must recover on strength of his own title.* *Pennsylvania Co. v. Owens*, 12, 200

21. *Effect of sheriff's return in Pennsylvania practice as proof of ouster.* *Bronson v. Lane*, 14, 349

22. *Title outstanding in a trustee will prevent a recovery by the beneficiaries.* *Hugunin v. McCunniff*, 14, 468

23. *Conveyance executed after action brought will not strengthen the title of plaintiff in trespass.* *Id.*

24. *Findings on admitted facts—Ouster.—Where, in ejectment, the answer admits ouster, it is erroneous for the court to instruct the jury that ouster was one of the issues to be tried, and that they must find thereon.* *Taylor v. Middleton*, 15, 284

25. *Recovery by single co-tenant.—A tenant in common has exclusive possession, and may treat the common property as his own against all the world, except his co-tenants.* *Hopkins v. Noyes*, 15, 287

26. *Ouster.—An applicant for patent can not rely on trial on want of proof of an ouster.* *Wolverton v. Nichols*, 15, 309

27. *Implied admission of ouster.—Admission of a deed to plaintiff, followed by an allegation of abandonment by plaintiff and re-entry by defendant, is an admission of the ouster.* *Ketchum v. Barber*, 15, 378

28. *One tenant in common may recover in ejectment the entire estate of himself and co-tenants.* *Erhardt v. Boaro*, 15, 473

29. *Where the claims of title to a mining claim set up by plaintiffs appear to be void in their inception, plaintiffs have no standing in court to question the validity of defendant's title.* *Omar v. Soper*, 15, 497

30. *What necessary to maintain for mining claims—Burden of proof.—To maintain an action of ejectment for a mining claim, the plaintiff must establish not only that he is in possession, but that a lode had been discovered on the claim prior to the commencement of action, and that such lode, so discovered, extends from the discovery shaft to the ground for which he sues. These are facts to be determined by the jury, from a preponderance of the evidence. As to them, the burden is on the plaintiff.* *Zollars v. Evans*, 4, 407

31. *An ejectment will lie for a coal mine.* *Comyn v. Kyneto*, 5, 198

32. *Adverse possession—Quarrying stone.* *Jackson v. Olitz*, 5, 202

33. *Tenant in common may recover against trespasser.* *Rowe v. Bacigalluppi*, 5, 287

34. *When a proper remedy.—Ejectment under the agreement would lie if Watson had occupied the land for other purposes, or to an extent greater than allowed by the contract, or, if the license was revocable, or had been forfeited by Watson.* *Rynd v. Rynd Farm Co.*, 5, 275

35. *Ejectment will lie by the lessee of an oil well.* *Karns v. Tanner*, 5, 239

EJECTMENT. *Continued.*

86. *Ejectment is a possessory action*, and to maintain it the defendant must be in possession, actual or constructive, at the time of the suit brought; and the plaintiff may recover upon proof of prior possession without other title. *Sears v. Taylor*, 5, 318

87. *Ejectment maintainable on receiver's receipt.* *Bracken v. Preston*, 7, 268

88. *Oil Lease.*—A lease of land "for the sole and only purpose of mining and excavating for petroleum, coal, rock and carbon oil, or other valuable mineral or volatile substances," vests a corporeal interest for which ejectment will lie. *Barker v. Dale*, 8, 597

89. *Ejectment, by licensee wrongfully ousted by the owner, may be maintained.* *Beatty v. Gregory*, 9, 234; *Contra, Rynd v. Rynd Farm Oil Co.*, 5, 275

40. *Title by parol will support action for possession.*—Proof by plaintiffs of their better right to the possession of a mining claim is sufficient to sustain an action to recover possession and damages for working the same. It is not necessary to prove a transfer of title by written conveyance; a parol transfer with delivery of possession is sufficient. *Antoine Co. v. Ridge Co.*, 10, 97

41. *Possession sufficient to support ejectment on public land.* *Robinson v. Imperial Co.*, 10, 370

42. *Title to maintain.*—Generally, any person vested with immediate right of possession can maintain ejectment. As against a trespasser, prior possession will support the action. As to mining claims, possessory title is sufficient: Rev. St. § 910. *Aurora Hill Co. v. 85 M. Co.*, 15, 531

43. *Title necessary to maintain ejectment.* *Goodright v. Scrymmer*, 5, 200

44. *Miner no trespasser—Statutory presumption as to public lands.* *Smith v. Doe*, 5, 218

45. *Vendee under executory contract can not recover in ejectment.* *Felger v. Coward*, 5, 273

46. *A corporation holding an agreement for a deed can not maintain.* *San Felipe Co. v. Belshaw*, 5, 315

47. *A party in possession ought not be compelled to bring ejectment.* *Munson v. Tryon*, 7, 469

48. *Indefinite mining right with privilege of purchase will not sustain ejectment.* *Harlow v. Lake Superior Co.*, 9, 47

49. *Title to known lodes remains in United States.* *Reynolds v. Iron Silver Co.*, 15, 591

50. *Plaintiff must prove affirmative title.*—In such case the rule which applies to actions of ejectment, and to all actions to recover possession of real estate, applies, namely, that the plaintiff can only recover on the strength of his own title and not on the weakness of defendant's title. *Id.*

51. *Parties.*—In ejectment for an undivided fourth of a mining claim, it is unnecessary to make the owners of the other three-fourths parties defendant; the only necessary party defendant is the one who does the plaintiff wrong. *Waring v. Crow*, 5, 204

EJECTMENT. Continued.

52. *Parties.*—In a suit in ejectment for a fraction of a mining claim, by some of the original locators against the others who have joined with strangers in relocating the claim, it is not necessary that all the relocators should be made parties to the suit. *Colman v. Clements*, 5, 247

53. *Outstanding title*, when it may and when it may not, beshown. *Mallett v. Uncle Sam Co.*, 1, 18

54. *Title in third party.*—The rule that an outstanding title in a third party will prevent a recovery by plaintiff, does not apply where both parties claim by mere possession. *Richardson v. McNulty*, 1, 11

55. *Abandonment—Separate veins.*—Defendants in ejectment may show abandonment or they may show that the lode they entered upon was a separate vein. *Atkins v. Hendree*, 2, 328

56. *Outstanding title*, no defense for possession. *Bradley v. Lee*, 4, 471

57. *Inconsistent and contradictory defenses*, to what extent allowed under the code. *Bell v. Brown*, 5, 240

58. *Defendant not confined to one title.* *Kahn v. Old Tel. M. Co.*, 11, 646

59. *In ejectment the question is as to who has the better title*; but before a defendant can prevail on an inferior or equitable title, he must first become an actor and invoke equitable affirmative relief. *Id.*

60. *An equitable defense may be set up in ejectment*, but such defense must contain all the essentials of a bill in equity, and the issue thus made is triable by the court without a jury as an equitable issue. *Id.*

61. *This rule does not avail a plaintiff who bases his claim on a legal title.* *Id.*

62. *Recovery on possession.*—Plaintiffs in ejectment for a mining claim may rest their recovery upon prior possession, and the action does not necessarily put in issue the legal title. Their recovery will not be conclusive of the title of their grantor. *Grady v. Early*, 12, 104

63. *Necessity of demand in ejectment against co-tenant.* *Hebrard v. Jefferson M. Co.*, 5, 270

64. *Facts which may be proved.*—Under an averment of the plaintiff's ownership in fee and right to possession, at the date of the commencement of the suit, he may prove any facts which would entitle him to possession at that time. *Sears v. Taylor*, 5, 318

65. *Priority of title or possession.*—The plaintiff need not go back in his title further than to antedate that of the defendant. *Id.*

66. *Void deeds based on title obtained by trespass.*—From the plaintiff's testimony, it appeared that he and two others had taken possession of his employers' mining claim during their temporary absence—a clear attempt to "jump" the ground—and after locating the same, the two others had conveyed to plaintiff. In ejectment for the claim, *held*, that the court properly refused to admit these conveyances as evidence of plaintiff's title. *Murphy v. Cobb*, 5, 330

EJECTMENT. *Continued.*

67. *Necessary proof.*—In ejectment the plaintiff must prove, first, title in himself, or the right to the immediate possession at the time of instituting the suit, and second, that possession was unlawfully withheld by defendant at the time. *Herbert v. King*, 5, 308

68. *Defendant may prove title under general issue in ejectment.* *Kahn v. Old Telegraph Co.*, 11, 645; *Meyendorf v. Frohner*, 5, 560; *Leggatt v. Stewart*, 15, 858

69. *Pleading—Description.*—A declaration in ejectment for mines (*de mineris carbonum*) is good without showing the number of mines, such description being well understood in the venue where laid. *Whittingham v. Andrews*, 5, 198

70. *Insufficient denial in ejectment—Admission by failure to fully deny.* *Burke v. Table Mt. Co.*, 5, 209

71. *Admission of ouster.*—An allegation, in a verified complaint, that “defendants wrongfully and unlawfully entered upon and dispossessed” plaintiff, is not sufficiently denied by a denial that “defendants wrongfully and unlawfully entered and dispossessed” plaintiff, because such denial admits entry and ouster. *Busenius v. Coffee*, 5, 214

72. *Constructive denial of plaintiff's possession by counter statement of defendant's possession.* *Smith v. Doe*, 5, 218

73. *Plaintiff must recover upon title averred.* *Eagan v. Delaney*, 5, 223

74. *Where facts constituting the title are averred, they must be proved as laid.* *Id.*

75. *Form and requisites of complaint in ejectment for a mining claim.* *Coryell v. Cain*, 5, 226

76. *Mesne conveyances not to be pleaded.* *Id.*

77. *The complaint in ejectment should not state the evidence, but only the ultimate facts constituting the cause of action.* *Depuy v. Williams*, 5, 251

78. *Pleadings—Sufficient averments.* *Sears v. Taylor*, 5, 318

79. *Character of title declared on immaterial.* *Id.*

80. *Title acquired after suit brought.*—Any title to the premises in dispute that accrued to the defendant after the commencement of the suit must be set up by a supplemental answer; otherwise defendant can not avail himself of it. *Kahn v. Old Tel. M. Co.*, 11, 645

81. *Title lost after suit brought.*—Where it is claimed that the plaintiff's right has terminated during the pendency of the action, the fact can not be shown unless pleaded by a supplemental answer by defendant; otherwise if the fact appears from the plaintiff's own evidence. *Id.*

82. *Variance—Averring a holding under district rules, when no district exists.* *Moxon v. Wilkinson*, 12, 602

EMINENT DOMAIN.

1. *Property in the minerals.*—Minerals found below the bed of the road and whose excavation is not necessary for the construction of it, remain with the owner of the soil; but as to the portion removed in order to build the road, the owner of the soil (the party whose lands have been condemned) can not claim them. *Evans v. Haefner*, 5, 344

EMINENT DOMAIN. *Continued.*

3. *Option to purchase.*—When a railroad company decline to purchase mines under a statutory option, they must leave the mines intact. *Bagnall v. London Ry. Co.*, 5, 366

3. *Fee not divested.*—The owner of the land is not divested of his right to the freehold, nor of his title to the stone, wood or mineral. The act fastens on his land a servitude, but does not disturb any right not essential to the servitude. *Lyon v. Gormley*, 5, 383

4. *Materials exsented.*—The petitioner does not acquire the ownership of materials he may displace, or any more than the right of way and the right to use those materials in the construction of his way. *Id.*

5. *Underground railroad not of public utility.* *Valley City Co. v. Brown*, 5, 397

6. *Essentials of a case for the exercise of eminent domain.*—There should be (1) a clear public use; (2) a controlling power retained by the government over the condemning party, and (3) extreme difficulty in effectuating the purpose in any other way. The combination of these three elements is perhaps as close an approximation as can be made, to a rule or test in such cases. *Id.*

7. *Condemning way under pretense of public use.* *Edgewood Co.'s Appeal*, 5, 406

8. *Definition of public use.*—Any appropriation of private property under the right of eminent domain for any purpose of great public benefit, interest or advantage to the community, is a taking for a public use. *Dayton M. Co. v. Seawell*, 5, 424

9. *Legislative assertions void when in contradiction of facts.* *Cons. Channel Co. v. Central Pac. R. R. Co.*, 5, 438. In general to the contrary is *Dayton Co. v. Seawell*, 5, 424

10. *Underground right of way.*—The owner of a stratum of coal is an owner of land; and an underground right of way through his vein may be condemned. *Brown v. Corey*, 5, 368

11. *Lateral railroads—Private contracts.*—An entry on land of another to build a lateral railroad, connecting mines with highways, is an entry under the State in its exercise of the right of eminent domain, in pursuance of public law, and all private contracts are subordinate thereto. *Id.*

12. *The Lateral Railway Act of May 5, 1862*, is intended to give the petitioner nothing more than a privilege to open, construct, complete and use a railway through the land of another. *Lyon v. Gormley*, 5, 383

13. *Pipe line.*—A pipe line for the transportation of petroleum with rates of toll fixed by its act of incorporation is a "highway" and an "internal improvement," and as such entitled to exercise the right of eminent domain. *West Virginia Co. v. Volcanic Co.*, 5, 389

14. *Power, when exercised.*—The power of eminent domain is conferred on citizens only when some existing public need is to be supplied, or some present public advantage to be gained, but not with a view to contingent results, dependent upon the success of a projected speculation. *Edgewood R. R. Co.'s Appeal*, 5, 406

EMINENT DOMAIN. *Continued.*

15. *Necessity and public advantage must combine.* *Dayton Co. v. Seawell*, 5, 424
16. *Taking property without compensation enjoined.* *Robertson v. Smith*, 7, 196
17. *Eminent domain not involved.* *Hobart v. Ford*, 15, 236
18. *Collateral attack.*—Judgment of condemnation can not be questioned in a collateral proceeding. *Evans v. Haefner*, 5, 344
19. *Effect of tender of condemnation money.* *Id.*
20. *Condemnation of way over coal lands—Title to coal.*—Where there are unopened coal veins on a tract of land over which a railroad is condemned, the case may be treated as one of wild lands, and the further inconvenience to opening the mines from the grade of the road-bed, etc., can not be considered. As to the minerals themselves, the railroad "gets no title to the coal further than it is needed to support the surface." *Searle v. L. & B. R. R. Co.*, 5, 333
21. *Condemning land for bringing water to Town, is within power of legislature.* *Thorn v. Sweeney*, 7, 564
22. *Condemnation of land in aid of mining as a public use maintained, and constitutionality of acts to such effect affirmed.* *Overman Co. v. Coreoran*, 1, 691; *Dayton Co. v. Seawell*, 5, 424; *Contra, Channel Co. v. Cent. Pac. Co.*, 5, 488
23. *Preliminary attempt to agree.*—An offer and refusal at the local office of a corporation when its president and directors reside out of the State is a sufficient attempt to "agree" under the statute. The condemning company was not bound to go out of the State to make the offer. *W. Va. T. Co. v. Volcanic Oil Co.*, 5, 339
24. *Damages reduced because of improved facilities for transit.* *Cleveland R. R. v. Ball*, 5, 333
25. *Measure of damages—Absolute and relative value.*—Where a piece or strip of land is, by appropriation made by a railroad company, severed from its connection with the other land of the owner, in estimating the compensation to be made to the owner, not only is the abstract value of the strip or piece taken to be considered, but also its relative value and the effect arising from its severance from the residue of the owner's land, as well as the uses to which it is to be appropriated. *Id.*
26. *Damage to residue—Betterments.* *Id.*
27. *Measure of damages—Unopened mines.* *Searle v. Lackawanna R. R.*, 5, 353
28. *Future inconvenience not a subject of damages.* *Id.*
29. *Ultior damage from railway by seepage from road-bed into mines.* *Bagnall v. London Ry.*, 5, 363
30. *Unforeseen damage from railroad construction and operation.* *Id.*
31. *Measure of damages.*—Upon the condemnation of a tract of coal severed from the surface, the measure of damages is the injury done to the whole tract, or the difference between its value at the time of the entry and its value after the completion of the road; and the inconvenience to the future working of that part of the tract not taken is to be considered. *Brown v. Corey*, 5, 363

EMINENT DOMAIN. *Continued.*

32. *Assessments for taxes are not competent evidence to aid a jury in determining the value of land. Hanover Co. v. Ashland Co.,* 10, 205

END LINES.

1. *Agreement between adjoiners to divide underground gore caused by divergence of end lines, construed. Champion Co. v. Wyoming Co.,* 16, 145

See LOCATION; SIDE LINES.

EQUITY.

1. *Novelty.*—A court of equity acknowledges and adapts itself to the novelties which arise from the diversified transactions of men. *Dougherty v. Creary,* 1, 85
2. *Disregarding findings of jury.*—The power to disregard or modify the findings of a jury in a chancery cause is inherent, the object of the verdict being not to decide the case, but to instruct or advise the conscience of the chancellor; and it is no reason for disturbing the action of the court that in passing upon the whole case it disregarded the findings of the jury. *Smith v. Richardson,* 1, 139; *Brandt v. Wheaton,* 1, 145; *Basey v. Gallagher,* 1, 683
3. *Damages allowed in equity, only as an incident. Koch's Appeal,* 4, 151
4. *Practice in U. S. courts, how regulated—Mandatory injunction. Stevens v. Williams,* 5, 449
5. *Account not allowed on bill for injunction.*—On bill filed by the assignees of lessees of salt works to enjoin part owners of it from disturbing their possession, the only issue is the right to an injunction and an account of profits can not be decreed. *Stuart v. White,* 5, 454
6. *Practice, where cases joined.*—But there being another case in the same court between the owners of the property, in which the court had taken possession of the property and rented it out, and both cases having been heard together, the order to account may be made in both cases. *Id.*
7. *Remedy at law.*—A motion to dismiss a bill in equity because the remedy at law is complete, comes too late if made for the first time at the trial term. *Belle Greene Co. v. Tuggle,* 5, 465
8. *Equity looks beyond the forms of law.*—In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been exercised in good faith to promote the interest of the stockholders. *Wright v. Oroville Co.,* 3, 558
9. *Attachment on land defectively conveyed.*—An attachment on land described in a deed which was invalid for want of sufficient attestation, will not prevail against the right of the grantee therein to have the same reformed. *Vermont M. Co. v. W. Co. Bank,* 3, 812
10. *Stockholders' suit—Necessary allegations in. Dannmeyer v. Coleman,* 5, 474
11. *Idem. Bona fide interest essential. Id.*

EQUITY. *Continued.*

12. *Distinction between law and equity inherent.* *Kahn v. Old Telegraph Co.*, 11, 646; *Basey v. Gallagher*, 1, 683; *Woolman v. Garringer*, 1, 675
13. *Where a party would be liable in case of loss, by parity of reasoning, he should be entitled to the gain in case of working to a profit.* *Johnson v. Lamping*, 14, 450
14. *Order concerning use of tunnel—Power of court to vary terms of contract.* *Manganese Co. v. Trotter*, 3, 133
15. *Prior appropriation.*—When court of equity will interfere to protect a prior appropriation of water. *Atchison v. Peterson*, 1, 583
16. *Equity has always had jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery.* And it is the only court for relief where the relief must consist in annulment. *Jones v. Bolles*, 5, 445
17. *Proof of complainant's interest in the issue.* *Id.*
18. *Equity will not try title.* *Irwin v. Davidson*, 7, 237
19. *Pennsylvania practice.*—Vesting a separate equity jurisdiction in the courts has not changed the rule that equity is part of the law of Pennsylvania, and may be administered by common law forms. *Ardesco Oil Co. v. North American Co.*, 8, 539
20. *The distribution among members of an unincorporated joint stock association of the common fund arising from the final disposition of the entire assets of the company, is one for equitable cognizance.* *Butterfield v. Beardsley*, 11, 495
21. *Equity will restrain acts amounting to breach of trust.* *Burke v. Flood*, 5, 469
22. *Notice of deed carrying equities.*—Notice of a deed brought home to its attorney or its cashier is notice to the bank he represents; and notice of a defective deed is notice of its equities and that chancery might reform and enforce it. *Vermont Co. v. Windham Bank*, 3, 313

ERROR.

1. *Error is prima facie injury.* *Jackson v. Feather River Co.*, 5, 594
 2. *Erroneous instructions are ground for reversal, if they are such that the jury might have been influenced by them.* *Kelly v. Taylor*, 5, 599
 3. *Error in charge upon one of several defenses.*—When several defenses have been pleaded and the court has erred in its instructions upon one of them, the court above not being able to say that the verdict was based upon the other defenses alone, will reverse for the error. *Wiseman v. McNulty*, 6, 326
 4. *No reversal for error where judgment clearly right.* *Robinson v. Imperial Co.*, 10, 871; *Bewick v. Fletcher*, 6, 117
 5. *When evidence is not objected to at the trial its admission will not be considered as error.* *Curtin v. Munford*, 12, 585
- See INSTRUCTIONS.

ESCROW.

1. *Custodian of escrow papers.*—The custodian of a deed in escrow refusing to deliver the same to any person, or threatening to deliver it to an adverse person, is a proper party to a bill in equity, for either specific performance or rescission. *Davis v. Henry*, 6, 680
2. *A deed delivered in violation of the conditions of an escrow* can have no force or effect as a deed. *Hamill v. Thompson*, 14, 697

ESTOPPEL.

1. *Suit pending—Statute of Limitations.*—F. commenced suit in support of an adverse claim under the mining act. *Held*, that the pendency of a former suit to recover possession of the mining claim in which F. was defendant would not estop B., the former plaintiff and present defendant, from claiming the benefit of the Statute of Limitations, although B. had averred in his complaint that F. was in possession. *420 Mining Co. v. Bullion Co.*, 1, 114
2. *Estoppel by silence.*—It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property, or even the improvements; but it is the fraud of the owner, who silently, or otherwise, encourages the expenditure. *McGarrity v. Byington*, 2, 311
3. *Estoppel against stockholders by acquiescence.* *Kent v. Quick-silver Co.*, 4, 47
4. *There is no estoppel between a corporation and the subscribers* to its stock; and its action to recover subscriptions may be defeated upon inquiry into the conditions upon which the subscriptions were made. *Coyote Mining Co. v. Ruble*, 4, 88
5. *No estoppel by silence, to affect title to real estate.* *Stone v. Bumpus*, 4, 271
6. *Election to abandon.*—Acts of estoppel by claimant of mining ground may be treated as his election to abandon his claim. *Golden Terra Co. v. Mahler*, 4, 890
7. *Water rights improved by non-owners.*—If those who have the prior right to water stand by and allow others to expend money and labor in appropriating the waters of a stream under the mistaken idea that they have the better right, the first appropriators will be estopped from setting up their prior right. *Parke v. Kilham*, 4, 523
8. *Parol contract for exchange of land maintained, possession being taken under it.* *Big Mountain Co.'s Appeal*, 5, 178
9. *Injunction against disturbance by estopped owner—Ejectment not equivalent to equitable relief.* *Id.*
10. *Sale by stranger—Silence of co-tenant.*—The mere passive acquiescence by a tenant in common in the sale of his co-tenant's interest by a party having no title, can not confer any title upon the vendee. *Waring v. Crow*, 5, 205
11. *Acquiescence by standing by at sale.* *Green v. Prettyman*, 5, 515; or by assent to sale. *Troxell v. Lehigh Co.*, 5, 517
12. *No estoppel, where no consideration—Revocation of parol authority to receive dues for ore.* *Troxell v. Lehigh Co.*, 5, 517
13. *Estoppel by assent to sale.*—Vendor held bound by the sale by

ESTOPPEL. Continued.

her agent to the company, made with her knowledge and consent, and was estopped from repudiating it so long as the ore bed was worked in good faith. *Id.*

14. *Estoppel against asserting parol rights, by quiescence at public sale—Innocent purchaser.* *Pool v. Lewis,* 5, 523

15. *The effect, not the intent, material.* *Patterson v. Hitchcock,* 5, 543

16. *Estoppel by use of terms in a special sense—Screened coal.* *Mercer M. Co. v. McKee's Adm'r,* 5, 531

17. *Lessee estopped by laches to assert his lease.* *Wickersham v. Chicago Zinc Co.,* 5, 536

18. *Claiming property after assisting in leasing it.* *Stewart v. Munford,* 5, 535

19. *Rescission effects an estoppel.* *Burns v. McCabe,* 7, 1

20. *Statement of intention no estoppel.* *Phillips v. Reeder,* 11, 420

21. *Office of estoppel.*—Estoppels shut the mouth of a party, whether his original act or declaration was intended to deceive or not. *Kirk v. Hartman,* 11, 450

22. *Government not estopped by representations of claimant.* *Boggs v. Merced Co.,* 10, 335

23. *Inconsistent positions of counsel.*—Counsel can not claim that there was a written sale so as to exclude proof of a verbal sale and at the same time insist that such alleged sale in writing was void. *Patterson v. Keystone M. Co.,* 13, 171

24. *Tacit consent amounts to agreement.* *Lockhart v. Rollins,* 16, 16

25. *Former recovery in trespass held an estoppel against defendant in second action.* *Outram v. Morewood,* 5, 484

26. *The element of mutuality in a judgment.*—In a case in which the findings and judgment are conclusive on both parties if conclusive on one, the estoppel is mutual within the rule, without regard to the question what would have been the effect, had the findings and judgment been different. *420 M. Co. v. Bullion Co.,* 11, 608

27. *Judgment reversed to avoid estoppel.*—If a judgment is broader in its scope and more advantageous to the plaintiff than he is entitled upon the record to have it, it may be reversed, although there is no technical error, solely upon the ground that all the points covered by it would be *res adjudicata* and operate as an estoppel. *Id.*

28. *Draftsman of deed estopped from claiming title to the premises conveyed.* *Fabian v. Collins,* 5, 21

29. *Grantee not estopped—One has a right to "buy his peace."* *Kahn v. Old Telegraph Co.,* 11, 647

30. *Admission not acted on, is no estoppel.* *Collins v. Case,* 1, 91

31. *Abandonment no element of estoppel.* *Marquart v. Bradford,* 5, 528

32. *Essential elements of estoppel—Representations by adverse claimant to intending purchaser.* *Patterson v. Hitchcock,* 5, 543

33. *False representations—Estoppel in pais.*—To constitute an

ESTOPPEL. *Continued.*

estoppel *in pais* for alleged false and fraudulent representations it must appear: 1. That there were representations concerning material facts. 2. The representations must have been made with the knowledge of the facts. 3. The party to whom they were made must have been ignorant of the truth of the matter. 4. They must have been made with the intention that they should be acted upon. 5. They must have been acted upon. *Meyendorf v. Frohner*, 5, 559

34. *Rules of estoppel in mining cases.*—The rules of law relating to estoppel *in pais* apply to mining ground the same as any other real estate claimed under a similar kind of title. *Kelly v. Taylor*, 5, 598

35. *Resultant injury, essential to perfect estoppel in pais.*—Parties who allow a stranger to enter upon their mining claim without notifying him of the extent and nature of their claim will not be estopped from afterward setting up their title unless the stranger was injured by the silence of the owners. *Id.*

36. *Estoppel by declaration of locator.* *Van Valkenburg v. Huff*, 9, 467

37. *Statements as to boundary*, coupled with other statements which indicated that the statement first made was a mere expression of opinion, does not show a license to work the plaintiff's ground, nor estop them from claiming the damages which they sustained by reason of the trespass. *Maye v. Yappen*, 10, 101

38. *Estoppel as to title by admissions and declarations*—No estoppel unless the party making them intended to deceive. *Boggs v. Merced Co.*, 10, 384

39. *Where two claims overlapped* and plaintiff's only possession of the disputed gore of land was a shaft sunk several years prior to the suit, the plaintiff, in trespass, asked the following instruction: "If the jury believes from the evidence that plaintiffs, * * * more than five years prior to the commencement of this suit, in good faith and under a claim of right, entered into the possession of said disputed ground, and have continued in possession thereof, and expended labor thereon, and that defendants have not forbidden plaintiff's possession so acquired, then the plaintiff is entitled to a verdict." *Held*, that the instruction failed to state the essentials of estoppel *in pais* and was not otherwise relevant. *Maine Boys' T. Co. v. Boston T. Co.*, 12, 247

40. *Parol agreement as to boundaries.*—In ejectment for a mining claim, where there is evidence tending to show an adjustment of boundaries between the parties by oral agreement, an instruction that if, under the oral agreement, improvements were made by one of the parties, this would work an estoppel, is erroneous, when there is no evidence that any such improvements had been made. *Garthe v. Hart*, 15, 492

41. *Equitable estoppel defectively pleaded*, but evidence admitted under it for want of objection in due time and form. *Fabian v. Collins*, 5, 20

42. *Estoppel to be pleaded specially, and at first opportunity.* *Iever-sham v. Emerson*, 5, 500

ESTOPPEL. *Continued.*

48. *Pleading former judgment—Outstanding title. Meyendorf v. Frohner,* 5, 559

EVIDENCE.

- A—ADMISSIONS AND DECLARATIONS.
- B—BEST AND SECONDARY.
- C—BURDEN OF PROOF.
- D—CERTIFICATES—COPIES—LOST PAPERS.
- E—CIRCUMSTANTIAL.
- F—CORPORATIONS.
- G—CROSS-EXAMINATION.
- H—DOCUMENTARY.
- I—FRAUD.
- J—HANDWRITING.
- K—IDENTITY.
- L—JUDICIAL NOTICE.
- M—IRRELEVANT.
- N—LEADING QUESTIONS.
- O—LETTERS.
- P—MEASURE OF DAMAGES.
- Q—MEMORANDA.
- R—NEGLIGENCE.
- S—OBJECTIONS TO TESTIMONY.
- T—OPINIONS—BELIEF.
- U—PAROL TO VARY WRITING.
- V—PRESUMPTIONS—PRIVILEGED COMMUNICATIONS.
- W—REBUTTAL.
- X—RECORDS.
- Y—VARIANCE.
- Z—WEIGHT AND SUFFICIENCY—WITNESS.

A. Admissions and Declarations.

1. *Admissions of grantor do not bind grantee. Golden Fleece Co. v. Cable Co.,* 1, 121
2. *Admissions by defendant's agents.*—To admissions by a director, and by the succeeding agent of the company, a general objection was made below. Such objection can not be made specific above. If their want of authority to bind the company had been suggested below, it might have been proved. *Cons. Gregory Co. v. Raber,* 1, 405
3. *Special instruction as to effect of admissions as to boundaries, construed. Overman Co v. American Co.,* 2, 251
4. *Tenure of Claim—Admissions as to extent.*—After a vested right to a claim has been acquired by compliance with the law, it is not held by so precarious a tenure that it can be reduced by mere declarations of superintendents or officers. *Dictum* as to admissions of officers as evidence, with citation of authorities, but no decision. *Id.*
5. *Assertion of right is no threat. Stone v. Bumpus,* 4, 278
6. *Admissions of legal conclusions made in ignorance of a party's legal rights are not conclusive. Merrick v. Peru Coal Co.,* 3, 584

EVIDENCE—Admissions, etc. *Continued.*

7. *Res gestæ*—*Declarations of miner*.—In an action to recover a quartz lode, the statement of the plaintiff, while working at a distance from the lode, that his object was to drain a ravine so as to run a tunnel into the lode, is admissible as a part of the *res gestæ*, and for the purpose of showing that the work was designed to be applied upon the claim. *Draper v. Douglass*, 5, 601
8. *Acts and declarations of incompetent witnesses*.—If a partner when called against his co-defendant to establish the partnership, is not a competent witness, his acts and declarations are equally incompetent for that purpose. *Bragg v. Geddes*, 5, 624
9. *Admissions made by a trustee to the prejudice of the trust fund*, and against the beneficiary, are not competent evidence in a suit against the trustee and his *cestui que trust*. *Id.*
10. *Testimony has no venue*. *Simons v. Vulcan Co.*, 6, 638
11. *Record of another action admissible against a party*. *Hyman v. Wheeler*, 15, 519
12. *An offer to prove "conversations," without showing, with the offer, their relevancy, may be refused, without error*. *Harris v. Tyson*, 14, 635

B. Best and Secondary.

13. *Diversion of water*.—Where parties go to issue in actions for the diversion of water, upon general averments and denials of title, anything that legally attacks or supports the respective titles is admissible in evidence. *Kimball v. Gearhart*, 1, 615
14. *Under the plea of non-assumpsit*, the defendant is entitled to give any evidence which shows that plaintiff has no right to recover; and in this case the court erred in refusing testimony that plaintiff had fraudulently substituted inferior coal for that which it contracted to deliver. *Scott v. Kittanning Co.*, 3, 159
15. *Value of secondary evidence*.—If secondary evidence be admitted at all, to establish a fact, it requires no more of such evidence than of the best; a preponderance is all that is necessary. *Silver M. Co. v. Fall*, 5, 288
16. *Proof of location and proof of purchase, distinguished*. *King v. Randlett*, 5, 605
17. *Justice's docket no evidence of service*. *Scorpion Co. v. Marsano*, 12, 502
18. *Instrument material if existent*.—A defendant claiming title under a written bill of sale must produce it or establish its loss before resorting to proof of its contents or proof of a verbal sale. *Patterson v. Keystone Co.*, 13, 171

C. Burden of Proof.

19. *Appurtenances*—A party who claims certain water rights under a sheriff's deed purporting to convey the "Monitor claims," with appurtenances, has the burden of proof upon him to show that they are so appurtenant. *Quirk v. Falk*, 2, 19

EVIDENCE—Burden of Proof. *Continued.*

20. *When by law or contract a duty is imposed upon a party the burden of relieving himself of that duty rests upon himself.* *Cook v. Andrews*, 3, 171

21. *What is prima facie case.*—In an action to quiet title to a mining claim, plaintiff, having proved a location and record with prior possession, has made a *prima facie* case, only to be overcome by proof that his title so gained has been by some means divested, or that a better title exists in the defendant. *Hammer v. Garfield Co.*, 16, 125

22. *Negative testimony.*—The rule in respect to the relative value of positive and negative testimony has no application to the case where one party to a verbal mining lease testifies that it did, and the other that it did not, include certain premises. *Sobey v. Thomas*, 4, 359

D. Certificates—Copies—Lost Papers.

23. *Copies of notice as evidence.*—A copy of the notice of appropriation prepared with the knowledge of the appropriators, seen by some of them as a posted notice, and posted where it must have been seen by others, is admissible in evidence to show the limited character of the appropriation. *McKinney v. Smith*, 1, 650

24. *Lost paper supplied by copy.*—A witness testified that a certain paper had been sent to some attorney several years ago, and after search, could not be found. Held, sufficient proof of loss to let in the copy produced. *Susquehanna Co. v. Quick*, 1, 203

25. *Lost district records, how proved.* *Belk v. Meagher*, 1, 522

26. *Lost record of location certificate, how supplied.* *Belk v. Meagher*, 1, 510

27. *Copy of contract.*—It is not error to admit a copy of contract in evidence, instead of the original, when the contract is set out *in hæc verba* in the complaint, and the answer does not deny the execution of it, but only denies the authority of the agent who signed it. *Boulder Valley Co. v. Tierney*, 2, 381

28. *Copy of notice of location.*—A copy of a notice posted on a claim to show its extent, is not admissible in evidence if the notice itself be obtainable. Such evidence is secondary, and is admissible only upon the terms which control its admission in other cases. *Lombardo v. Ferguson*, 5, 588

29. *Certificate of entry at U. S. land office as evidence.*—It is necessary to first prove the signature of the register. *Jackson v. McMur-ray*, 12, 164

30. *Use of pleadings as evidence.*—The fact that the plaintiffs, in an action for converting ore taken from their mine, were not the owners of the whole mine, can not be proved by the introduction of a complaint signed and verified by an agent of part of plaintiffs and another party, in a suit to enjoin the same defendants from trespassing on the mine, though such complaint is admissible to impeach the testimony of the agent, if inconsistent therewith. *Omaha Co. v. Tabor*, 16, 184

E. Circumstantial.

31. *Surrounding circumstances.*—In cases of construction, facts

EVIDENCE—Circumstantial. *Continued.*

existing at the time words are used, may be proved as a key to their meaning. *Richards v. Schlegelmich*, 3, 78

F. Corporations.

82. *Corporation books.*—Entries from the stock ledger and company books, *held*, competent to show the amount of stock issued; and that it included the stock allotted to this block, and to show the transactions of the company in respect thereto. *Chapman v. Porter*, 1, 102

83. *Transfer book not proved by inspection.*—That a certain book is the transfer book of a corporation can not be proved by inspection. Corporation books do not prove themselves. *Pittsburg Co. v. Foster*, 10, 116

84. *When a corporation buys property*, and operates it, it is a ratification of the purchase by its officers, though irregularly made. *Moss v. Rossie Co.*, 1, 290

G. Cross-examination.

85. *The object of cross-examination is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained.* Evidence which conceals a part of the transaction is defective. Any question which fills up such omission is legitimate. The question put to witness on cross-examination, whether he had not admitted his fraud in the issue of negotiable paper should have been allowed, as bearing directly on the trustworthiness of his evidence. *New York Mine v. First Nat. Bank*, 1, 454

86. *Entirety of conversations.*—If part of a conversation is given in evidence by one party, the opposite party is entitled to bring out the rest of it. Nor can it make any difference whether the part is brought out by direct examination of a party's own witness or the cross-examination of the witness of his adversary. *Wolf Creek Co. v. Schultz*, 3, 95

87. *Cross-examination on the sources of appropriation.* *Caruthers v. Pemberton*, 4, 622

88. *Cross-examination as to interruption of transit.* *Cleveland Co. v. Ball*, 5, 333

89. *Cross-examination for purposes of denial.* *Jackson v. Feather River Co.*, 5, 594

40. *No foundation for.*—It did not appear from the transcript that a question asked upon cross-examination was ever answered, nor did it appear but that the direct examination had laid a foundation for the question. *Held*, that the action of the lower court in overruling the objection to the question must be affirmed. *Hansen v. Martin*, 5, 643

41. *On cross-examination the defendant is to be confined to the testimony given by the witness in chief.* *Turner v. Reynolds*, 12, 190

H. Documentary.

42. *Admission of title-papers, when location disputed.*—The court can not exclude conveyances offered in evidence, upon the grounds of

EVIDENCE—Documentary. *Continued.*

invalidity in the location upon which they are based, when the validity of such location is at issue before the jury, depending upon a question of fact, which it is for the jury to decide. *Golden Fleece Co. v. Cable Co.*, 1, 121

43. *Rule as to admission of altered instruments.*—Where an alteration is such as to defeat the tenor of an instrument, it must be explained before it is allowed in evidence. In other cases, it goes to the jury without such proof. *Cheney v. Barber*, 3, 66

44. *Collateral recitals in deed as evidence in partition.*—The deed from Clement to Alfred recited that Clement held the said land in common with Edward. In an action of partition by the heirs of Edward against Alfred, *held*, that the deed was *prima facie* evidence for plaintiff of the title of Edward's heirs. *Grubb v. Grubb*, 7, 226

45. *Sheriff's deed—Execution.*—The party relying on a sheriff's deed, must produce not only the judgment and the sheriff's deed, but also the execution under which the property was sold. *Quirk v. Falk*, 2, 19

46. *Unexecuted paper not evidence.*—A draft lease was prepared by the lessor in pursuance of the within contract, which was not objected to by the lessee, who afterward refused to complete. *Held*, that the draft lease could not be used for the purpose of controlling or explaining the contract itself. *Haywood v. Cope*, 6, 499

I. Fraud.

47. *Proof of unfair motive.*—Proof of a motive to unfairness corroborates the proof of unfairness, and renders it more credible. *Hazleton Co. v. Buck Mt. Co.*, 2, 389

48. *Evidence of value from subsequent working.*—Where, in support of an allegation of fraud in the purchase of a mining claim, it became material to show that the purchaser knew that he was paying an inadequate price, it was *held*, that the amount of gold dust extracted from the mine subsequent to the sale was not admissible to prove knowledge by the purchaser of the real value of the mine. *Henry v. Everts*, 5, 603

J. Handwriting.

49. *Execution of bill of sale, how proved—Handwriting of subscribing witness.* *Jackson v. Feather River Co.*, 5, 594

50. *Questionable cancellation of stamps on note.* *Rees v. Jackson*, 5, 615

K. Identity.

51. *Postponement for mine-development.*—The statutes of Nevada, allowing mining suits in certain cases to be continued until further development is made, can not be construed as excluding all evidence as to the identity of the veins except that produced from actual workings. *Silver Co. v. Fall*, 5, 233

52. *Identifying property described in deed—Order of proof.*—Where documentary evidence in the shape of conveyance of mining

EVIDENCE.—Identity. *Continued.*

claims is admitted, further proof may be given, if requisite, to show the identity of the claims with those mentioned in the complaint, and the court will not control the order of proof. *Jackson v. Feather River Co.*, 5, 594

L. Judicial Notice.

53. *The political and social condition of a country are matters for the judicial cognizance of its courts.* *Irwin v. Phillips*, 15, 178

M. Irrelevant.

54. *Irrelevant testimony.*—A judgment will not be reversed because of the admission of irrelevant testimony unless it is clearly made out to be irrelevant, and even then it ought to be shown that the proof tended to mislead or unduly influence the jury. *McGarrity v. Byington*, 2, 311

55. *Testimony which is prima facie irrelevant is properly excluded unless counsel explain how it is admissible, or offer to connect it.* *Id.*

56. *Testimony irrelevant at the time offered.*—A decision of the court refusing to admit certain testimony, which was correct at the time of such refusal, will not be reversed because testimony subsequently introduced rendered the offered testimony material. *DePuy v. Williams*, 5, 251

57. *No error when evidence immaterial.* *Champion Co. v. Wyoming Co.*, 16, 145

N. Leading Questions.

58. *Leading question defined.*—A leading question is one which indicates the answer which the party desires. *Susquehanna Co. v. Quick*, 1, 202

59. *Question calling for a conclusion of law.*—It is not error to disallow a question, the answer to which is a deduction rather than a fact; for instance—Was it not your business to be on the lookout for dangerous places?—when the contention was whether the witness or some other party was liable for the consequences of a failure to keep such lookout. *Lake Superior Co. v. Erickson*, 10, 89

O. Letters.

60. *Proof of mailing letter.*—A witness produced a copy of a letter which, he said, was made by him, and swore that he should, in the ordinary course of business, have posted the original. *Held*, that this was evidence of posting, and that the original not having been produced, the copy was good secondary evidence. *Trotter v. Maclean*, 10, 264

61. *Letter, as evidence.*—A witness having testified that he had received a letter from defendant, the contents of which he communicated verbally to the plaintiff, it was not error to permit the letter to be read to the jury—it being evidence of the defendant's fair dealing in relation to the contract sought to be set aside, and relevant to the point in controversy. *Harris v. Tyson*, 14, 635

EVIDENCE. *Continued.*

P. Measure of Damages.

62. *Variation in freights.*—Testimony that freights were usually higher in autumn than in summer, upon suit for damages for delay in delivering coal, is clearly competent. *Merrimack Co. v. Quintard*, 2, 344

63. *Loss of customers.*—On the trial of an action for interference with the flow of water in a ditch for supplying mines, proof that in consequence of the irregularity of the flow of water the owners of the ditch have lost their customers, is competent evidence "as showing that the damage to the plaintiff was not trivial or temporary, but of such a character as to cause actual and serious injury." *Natoma Mining Co. v. McCoy*, 4, 590

Q. Memoranda.

64. *Diary memoranda.*—An entry in a diary kept by an agent is not admissible to prove a fact therein stated unless it is shown that it was the duty of the agent to make the whole entry. *Trotter v. Maclean*, 10, 264

65. *Book entries* may, under circumstances, amount to memoranda only. *Goodspeed v. Lead Works*, 11, 178

R. Negligence.

66. *Evidence of negligence of agent.*—Evidence that other agents in similar business at the same place did much more business than the plaintiff, is not admissible to prove his negligence or default. *Kirk v. Hartman*, 11, 450

S. Objections to Testimony.

67. *The general objection "irrelevant and incompetent,"* made before the master in an equity case, is not sufficiently specific to be entitled to consideration upon the hearing. *Hamilton v. Southern Nevada Co.*, 15, 315

68. *General objections to evidence.*—Where there is a general objection to the evidence and part is admissible, it is not error to overrule the objection, although part of the offer be inadmissible. In such case there must be a special objection to the inadmissible part. *Laubach v. Laubach*, 10, 177

69. *Practice, where erroneous testimony is admitted by mistake.*—The refusal to strike out the evidence of a witness afterward ascertained to be interested, is not assignable for error. It is to be corrected by a request to charge that the evidence be disregarded. *Simons v. Vulcan Oil Co.*, 6, 633

70. *When plaintiff fails to make a prima facie case* on certain points, rejection of his offers of testimony on other points, is not material. *Hebrard v. Jefferson Co.*, 5, 270

71. *Operation of evidence restricted.*—The operation of evidence is properly restricted to the purpose announced at the time it is offered and admitted. *Henry v. Everts*, 5, 603

EVIDENCE *Continued.*

T. Opinions—Belief.

72. *Opinion of witness as to value of land.*—The opinion of a witness, as to the amount of damages which a land owner will sustain by the appropriation of a portion of his land for the purpose of constructing a railroad over it, is not admissible as evidence, but a witness may be allowed to give his opinion as to the value of the land affected. *Cleveland & P. R. R. Co. v. Ball*, 5, 838
73. *Belief of interest explainable.*—The belief that a party is interested in a mine or the expression of that opinion does not conclude a party, contrary to the fact. *Vice v. Anson*, 11, 244
74. *A man's belief is a condition of his mind* and can not affect the title to his property. *Baker v. Chase*, 12, 66
75. *Inference of witness.*—The testimony of a witness that he took from what a party said that such party and another were partners, etc., is not evidence. It is a mere impression or inference. *Bragg v. Geddes*, 5, 624
76. *Existence of coal beds* proved by opinion of experts. *Stambaugh v. Smith*, 15, 82

U. Parol to Vary Writing.

77. *Offer to prove terms of sale of oil well* differing from those expressed in written contract, disallowed. *Penniman v. Winner*, 2, 448
78. *Parol evidence to prove quality.*—Where there is any doubt about the identity of the article agreed for, parol evidence may be given to identify it; but where the agreement is for a known article of merchandise, parol evidence is not admissible to show that it was to be of a certain kind or quality. *Fitch v. Archibald*, 2, 555
79. *Parol evidence not admissible to vary written instrument.* *Taylor v. Holter*, 3, 322
80. *Proof to supersede written contract.* *Ross v. Heathcock*, 3, 404
81. *Where a written contract is full and unambiguous*, parol testimony will not be admitted to explain the understanding of the parties. *Belle M. Co. v. Tuggle*, 5, 464
82. *Parol testimony admitted to explain the word "north"—Magnetic variation.* *Jenny Lind Co. v. Bower*, 5, 589
83. *Parol explanation of calls and terms in deed is admissible.* *Reamer v. Nesmith*, 5, 610
84. *Surplusage—Meaning of miner's phrases.*—If part of the claims were north of the road, there might still be enough true calls to enable the false to be rejected as surplusage, and that the phrase, "running back into the hill," might be shown to be a mining term and its meaning explained. *Id.*
85. *Parol evidence not allowed to control clear contract.*—Where there is no ambiguity in the terms of the lease, parol evidence will not be let in to show that the lessee was to be restricted to particular purposes in his use of the leased ground. *Burr v. Spencer*, 8, 450
86. *Evidence of declarations of a party* to a written contract at an indefinite time prior to it, is not admissible to introduce a new term into the contract. *Kirk v. Hartman*, 11, 450

EVIDENCE—Parol to Vary Writing. *Continued.*

87. *Parol evidence to qualify note.*—Evidence of a parol agreement at the execution of a note given for additional stock in a manufacturing company, that the note was not to be paid except on a contingency, is inadmissible. *Hacker v. National Oil Co.*, 13, 558

88. *Proof of contemporaneous understanding* allowed to aid the construction of terms of art whose meaning is contested. *Lewis v. Fothergill*, 15, 272

V. Presumptions—Privileged Communications.

89. *Direct proof of a fact* overcomes all presumptions to the contrary. *Hillyer v. Overman Co.*, 3, 44

90. *Obligation accepted from corporation—Presumption.*—One accepting the obligation of a company as the engagement of a corporation clothed with statutory liability only, and treating with them as such, is presumed to have known the extent of that liability, and to have acted with reference thereto. *Humphreys v. Mooney*, 4, 76

91. *Presumption of ownership in locator.* *Leadville M. Co. v. Fitzgerald*, 4, 380

92. *Presumption of fact from fact.*—One fact can not be presumed from another fact which is itself but an inference. *McAleer v. McMurray*, 6, 607

93. *Matters of privilege.*—An agent claiming loss through a customer is not privileged to conceal his name on cross-examination. *Williams v. Chicago Co.*, 1, 398

W. Rebuttal.

94. *Rebuttal defined.*—Rebutting evidence is such as explains or counteracts evidence that comes out on the defense. *Smith v. Richardson*, 1, 139

X. Records.

95. *Mining records as evidence.*—The original record of mining claims having been destroyed, plaintiff was allowed to introduce a new record of mining claims which had been prepared in pursuance of a resolution of miners requiring claims to be recorded; *held* to be competent to prove that the claim had been recorded according to the rules of the vicinage. *McGarrity v. Byington*, 2, 311

Y. Variance.

96. *Contract must be proved as laid.* *Cheney v. Barber*, 2, 692

97. *Attempt to prove two titles.*—Plaintiffs attempted to derive title through two different locations, and proved a clear title under the second, without objection by defendants. *Held*, that this was sufficient to sustain a verdict for plaintiffs, and that the admission of evidence relating to the first location, even if erroneous, became immaterial. *St. John v. Kidd*, 4, 454

98. *Proof of extra work* in suit upon contract, excluded when the complaint declares on the contract only. *Hinkle v. San Francisco R. R.*, 5, 645

EVIDENCE. *Continued.*

Z. Weight and Sufficiency—Witness.

99. *Credibility of witnesses.*—The testimony being conflicting with regard to the existence of an agency, all questions relative to the credibility of the witnesses are for the court below. *Hardenbergh v. Bacon*, 1, 352

100. *Interested witness.*—A defendant who has suffered a default in suit upon a note, will not be allowed to testify that he was authorized by his co-defendant to sign the same note, when by so doing he would reduce the amount of the judgment against himself. *Washburn v. Alden*, 1, 820

101. *Witness must be competent when he gives his deposition.*—It is of no importance that he becomes qualified afterward. *Kimball v. Gearhart*, 1, 615

102. *Conflicting testimony—Duty of courts.*—The duty of determining the truth where testimony is conflicting, belongs almost exclusively to the *nisi prius* courts; but it is also the duty of all courts to ascertain whether, upon any given state of facts, it can be harmonized, before rejecting any of it. *Barnes v. Sabron*, 4, 674

103. *Meaning of general expressions.*—General expressions go to the jury to be interpreted according to the circumstances and other conversation between the same parties. *Bradley v. Poole*, 6, 510

104. *Scintilla of evidence.*—The doctrine that if there is only a scintilla of evidence for the jury, the verdict of the jury is not to be disturbed, is now exploded. *Mellors v. Shaw*, 9, 678

105. *Proof beyond a reasonable doubt* is such as men would act upon in the most important affairs of life and such as would satisfy their judgments and consciences. *Stockbridge Co. v. Hudson Co.*, 18, 150

106. *Evidence of the assertion of a claim, distinct from its proof.* *Stewart v. Chadwick*, 13, 237

107. *If testimony conflicts*, the judgment will not be disturbed on the ground that it is not warranted by the evidence. *Child v. Hugg*, 13, 512

108. *Analysis of the reasons why courts refuse to reverse on the weight of evidence alone.* *Illinois Co. v. Ogle*, 10, 282

109. *Proof of title to an adjoining claim*, when title to such claim only incidentally involved, need not be strictly proved. *DeNoon v. Morrison*, 16, 88

EXCEPTION.

1. *Reservation construed as an exception.* *Whitaker v. Brown*, 5, 656

2. *"Reserving" construed as "excepting."* *Sloan v. Laurence Co.*, 5, 659

3. *Exception in covenant strictly construed.*—The exception "that the said premises are free from all incumbrances whatsoever, except a claim which J. W. has on said land for iron ore," can not be extended beyond the plain and ordinary meaning of the words, and will not be construed to except the entire claim of J. W. under a deed which has

EXCEPTION. Continued.

been a matter of public record for many years and which includes both iron ore and coal, with the further privilege of roads. *Stambaugh v. Smith*, 15, 82

4. *The coal privileges and right of way are incumbrances* within the meaning of the covenant. *Id.*

5. *Void exception.*—If land be leased in which there is a hidden mine, and the lessee opens it and then assigns his term with an exception of the profits of the mines, or the mines themselves, or of the timber, trees, etc., such exception is void. *Saunders' Case*, 15, 109

EXECUTION.

1. *Ore buyer holding proceeds for special use.*—Such proceeds are not liable to garnishment by creditor. *Cahill v. Bennett*, 5, 664

2. *Preference to laborers—Local statute.*—King and Morrow carried on mining; execution was issued against King for his individual debt, and his interest in the partnership sold by the sheriff. *Held*, that under the act, the laborers for the firm had no claim on the proceeds of the sale, which only represented the interest of King incumbered with the joint debts. *Ward's Appeal*, 5, 666

3. *Execution inoperative against parties not served.* *Wiseman v. McNulty*, 6, 326

4. *Motion to stay proceedings on*, denied on the strength of the proofs taken. *Audenried v. Woodward*, 12, 641

5. *Levy on stone before measurement*, sustained. *Watts v. Tibbals*, 5, 662

6. *Sufficient levy on leasehold.*—Under an execution against a lessee, a sheriff went upon the leased premises, examined them, etc., and afterward, out of view of them, he indorsed a description of them on his writ, and returned that he had levied on them as described. *Held*, a good levy. *Titusville Works' App.*, 9, 17

7. *An inaccurate description of a levy may be explained by oral evidence.* *Id.*

8. *Collecting execution by working a gold mine.* *Rowe v. Bradley*, 14, 431

9. *Sheriff's sale—Levy.*—What property passes to a purchaser at sheriff's sale must be ascertained from the levy under the *feri facias*; its quantity and character can not be extended or diminished by any subsequent official act of sale or conveyance. *Grubb v. Guilford*, 5, 163

10. *The purchaser at a judicial sale acquires only the present interest* of the judgment debtor. No after-acquired title is affected by such a sale. The sheriff's deed can, at most, only have the operation of a quit-claim deed in the strictest sense. *Hamilton v. Nevada Co.*, 15, 315

EXECUTORS AND ADMINISTRATORS.

1. *Kindness to the dead can not make a party liable as executor de son tort.* *Graves v. Poage*, 5, 670

2. *A gratuitous bailee is liable for negligence only.* *Id.*

3. *A contract to supply weekly shipments of coal* is not one of personal skill, and survives to the administrators of the buyer. *Smith v. Wilmington Co.*, 5, 679

EXECUTORS AND ADMINISTRATORS. *Continued.*

4. *Executors have no power to organize a mining company as a means of disposing of the coal lands of an estate.* *Adair v. Brimmer*, 5, 682

5. *Accounting by executors.*—Debts owing by individual executors to the estate should remain in the account as assets of the estate, and it is not proper to credit them to the executors as uncollected debts. *Id.*

6. *Payments by debtor executors.*—A mortgage debt due by the estate was, with the consent of the executors, canceled by the personal obligation of two of them who were indebted to the estate, but the estate afterward paid the obligation. *Held*, that under the peculiar circumstances of the case, it was not the intention of the parties to relieve the estate from responsibility, and that the payment should be allowed. *Id.*

7. *Overpayments to legatees.*—Executors are not entitled to credit for interest paid to raise money with which to make advances to legatees beyond their distributive shares, nor can they claim credit for overpayments and thereby diminish or postpone the amounts payable to other legatees. *Id.*

8. *Duties generally.*—For the duties and liabilities of the executors of a large estate and the proper mode of accounting, see the opinion. *Id.*

9. *Liability for co-executor's default.*—Where one of the executors was intrusted with certain stock and bonds on his promise to sell the same and pay the proceeds into the general fund, *held*, that trusting to this promise was not such negligence or improvidence on the part of the executors as to render them liable for the default of their co-executors. *Id.*

10. *Estate of intestate liable for certain of his torts.*—For coal taken by him from the plaintiff's land, if the intestate has sold it and received the money. *Powell v. Reese*, 5, 676

11. *Action for royalties by executor.*—The executor and not the heir is the proper party plaintiff in an action to recover rents or royalties which fell due before the decease of the lessor. *McDowell v. Hendrix*, 9, 96

12. *Right of action in trespass survives to executor.* *Barton Co. v. Cox*, 10, 158

13. *Construction of devise of mines and iron works.* *Crawshaw v. Maule*, 11, 228

14. *Probate jurisdiction*—"Late resident."—A petition for letters of administration on an estate, stating that the deceased was "late a resident" of the county, etc., instead of stating that his residence was there "at or immediately preceding his death," in the language of the statute, is sufficient to give jurisdiction. *Abel v. Love*, 11, 850

15. *Public administrator duly authorized.*—*Letters of administration unnecessary.* *Id.*

16. *Contract of administrator inures to heirs.* *Stewart v. Chadwick*, 13, 236

17. *Fraudulent administration*—*Equity jurisdiction.*—A Federal

EXECUTORS AND ADMINISTRATORS. *Continued.*

court, as a court of equity, has jurisdiction to call an administrator to account, who has defrauded the estate in the course of his trust, notwithstanding the Probate Court, which appointed him, has passed a decree finally settling his accounts and discharging him, the fraudulent acts not having been raised therein. *Van Bokkelen v. Cook*, 13, 421

18. *Administrator's deed.*—In showing title by an administrator's deed, the power to sell must be proved. *Yahoola Co. v. Irby*, 14, 460

19. *Practice—Suit against executor.*—In an action against the executor of an estate it must appear that the executor had rejected the plaintiff's claim before suit, but the statute does not require the indorsement of such rejection upon the claim nor a specific demand for an indorsement of its allowance. *Stambaugh v. Smith*, 15, 83

20. *An executor can not be charged, as such, with acts of waste done under another capacity.* *Lynn's App.*, 15, 126

EXHAUSTED MINE.

1. *Covenant compelling exhaustion regardless of surface support.* *Shafto v. Johnson*, 15, 363

2. *Payment out of profits—Contract making workability to a profit, a matter for the purchaser's individual judgment.* *Krum v. Mersher*, 15, 415

3. *Plea of exhausted mine or mineral non-existent allowed as defense to a lessee.* *Muhlenberg v. Henning*, 15, 423

4. *Where no ore found, no royalty due.* *Gibben v. Atkinson*, 15, 428

EXPERT.

1. *Underground railroad crossings.*—Where it is sought, in the exercise of eminent domain, to construct an underground railroad, crossing the railroad of a coal mine owner down in the mine, "the dangers and delays of crossing the plaintiff's road" are fit matters to be considered by the jury, aided by the testimony of skilled witnesses, in arriving at the measure of damages. Such dangers and delays may be reasonably anticipated, and the plaintiff is not bound to wait until their actual experience, when it would be too late for compensation. *Brown v. Corey*, 15, 363

2. *An expert knows that he can not be indicted for perjury, because his testimony is matter of opinion; he is employed in the sense of gain by the person who calls him, and he is selected according as his opinion is known to incline.* *Abinger v. Ashton*, 6, 1

3. *The evidence of persons not familiar with mines contrasted with that of experienced miners.* *Tuck v. Downing*, 7, 84

4. *No judicial knowledge assumed in matters of expert testimony, e. g., the proper method of boring and tubing salt wells.* *Clark v. Babcock*, 8, 600

5. *Competency of witness as to value of land.*—Witness stated generally that he owned land in the neighborhood, and was acquainted with its market value; that he knew the general value of ore land in the neighborhood; knew the tract in question, and it had on it an ore bank, but his knowledge of sales was derived from hearsay, and he

EXPERT. *Continued.*

had no practical knowledge of ore land; never mined. *Held*, that his opinion was competent evidence. *Hanover Co. v. Ashland Co.*, 10, 204

6. *Distinction between expert and ordinary testimony stated.* *Kahn v. Old Telegraph Co.*, 11, 848

7. *On the issue of vein continuity* expert testimony is admissible. *Id.*

8. *Opinions of experts are not the safest evidence*, but when they constitute the best available form of evidence, are resorted to from necessity. *Id.*

9. *Cause of injury to water ditch.*—The proper course in such cases is to take the opinion of witnesses who have examined the adjoining premises and are otherwise qualified to judge intelligently of the cause producing the injury in question—not a supposed similar injury elsewhere. *Clark v. Willett*, 4, 628

10. *Discretion of court.*—The competency of a person to give his opinion as an expert, if on a preliminary examination he appears to have any pretensions to speak as such, rests much in the discretion of the judge trying the cause. *Ardesco Co. v. Gilson*, 10, 669

11. *Idem.*—It is not imperatively required that the business or profession of the witness should be that which would enable him to form an opinion. *Id.*

12. *Evidence of increased value of mine due to development.*—*Held*, that the witness had sufficient knowledge to form an intelligent opinion of the value of the premises before and after development; and other evidence showing some of the improvements to have been of a permanent and valuable character having gone to the jury, the testimony of the witness should have been admitted. *Kille v. Ege*, 12, 654

FAULT.

1. *Hardship produced by.*—Where it was agreed that defendants would deliver a certain quantity of iron ore, which was to be the ore mined by E. B. on the lands of either Montgomery or Frick, and the plaintiff afterward refused to receive any more ore from the Montgomery mine, and it appeared that there was sufficient ore in the Montgomery mine to fulfill the contract, but that a fault existed in the Frick mine, which rendered it expensive to work, the defendants were thereby excused from delivering any more ore. It was not error under such a state of facts for the court to instruct the jury that it would be a hard case to subject the defendant to heavy damages. *Grove v. Donaldson*, 2, 507

2. *Lessee can not hold lease and refuse to work—Accident from fault.* *Morris v. Smith*, 6, 22

3. *Fault considered as affecting right to specific performance.* *Davis v. Shepherd*, 6, 24

4. *The burden of proof* lies upon the party seeking specific performance to prove such fault, so as to leave no reasonable doubt as to its location. *Id.*

5. *Considered as an inevitable risk* of coal mining. *Clegg v. Edmondson*, 8, 180

6. *Caveat emptor.*—In applying the rule of *caveat emptor* to the case of leases of coal mines, it must be remembered that every one

FAULT. *Continued.*

acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults. *Ridgway v. Sneyd*, 8, 414

FINDINGS.1. *Evidence sufficient to justify findings relative to gold mining.*—

A jury is justified in finding that the defendant is engaged in mining for gold when both plaintiff's and defendant's witnesses speak of his "claim," and of his labor as "mining," and also of his "sluice-boxes," "wing dam," and of his mode of "working claim," and "depositing tailings," when there is no counter testimony. *Hill v. Smith*, 4, 597

2. *Presumption as to findings.*—The trial being by the court without a jury, and judgment rendered for defendant, if no findings of fact are made, the presumption is that all issues were found against the plaintiffs. *Clark v. Willett*, 4, 628

FIXTURES.

1. *Colliery engines go to the tenant.*—Tenant for life, or in tail, erects a fire engine to work a colliery. It shall, on his death, be considered as part of his personal estate, and not go with the real estate to the remainder man. *Dudley v. Warde*, 6, 34

2. *Trade fixtures removable.*—What is annexed to the freehold is to be considered as part of it. But, between landlord and tenant, the latter may, during the term, remove what he erects for trade. *Id.*

3. *Buildings accessory to engines.*—Where engines, etc., are the principal, and the house only accessory, they may be removed, though the house be thereby injured. *Id.*

4. *Salt pans.*—Held, that iron salt pans, placed by defendant on a frame or brick and used in the boiling of salt, were parcel of such works. *Mansfield v. Blackburne*, 6, 36

5. *Distinction between trade and other fixtures stated.* *Voorhis v. Freeman*, 6, 49

6. *Machinery temporarily detached.*—Different rule applied to vendors and lessors. *Id.*

7. *Apparatus.*—Without the application of this rule the word *apparatus* used in the conveyance would have been sufficient to bring the same result. *Id.*

8. *A steam engine and boilers fixed in an anthracite furnace for the manufacture of iron are part of the realty.* *Roberts v. Dauphin Bank*, 6, 54

9. *Fixture defined.*—Various definitions of "a fixture," reviewed. It is agreed to be "an article of a personal nature affixed to the freehold. *Merritt v. Judd*, 6, 62; *Prescott v. Wells*, 6, 89

10. *Pump, boiler and engine are removable trade fixtures.* *Merritt v. Judd*, 6, 63

11. *Right of removal subject to special contract.*—The right of removal is subject to the agreement of the parties, or may be controlled by local usage. *Id.*

12. *Improvements.*—Such machinery as above described is included by the term improvement. *Id.*

13. *Subsequent contract, without merger.*—When the lease stipulated that the improvements were to go to the lessor on forfeiture, the lessor's right is not lessened by his giving a title bond for the con-

FIXTURES. *Continued.*

veyance of the fixtures, with the terms or payments of which the lessee failed to comply. *Id.*

14. *Renewal.*—The renewal of a lease destroys the lessee's right to remove fixtures. *Id.*

15. *Law of fixtures affected by the relation of the parties.*—A deed or mortgage carries fixtures as parcel of the freehold where, as between lessor and lessee, the lessee would be entitled to remove them. *Id.*

16. *Title bond.*—A title bond is in effect a mortgage; the legal title remains in the vendor with an equity in the vendee to have the title to the whole estate, including fixtures, on compliance with the conditions. *Id.*

17. *Tramways.*—Tenant not enjoined against removing them. *Beaufort v. Bates*, 6, 75

18. *Works, roads and ways.*—Neither of the terms, works, roads or ways, covers a temporary tramway not affixed to the freehold. *Id.*

19. *Amalgamating machinery* furnished to a mill owner upon his agreement to pay rent therefor and attached to the realty considered as within the latter definition of fixtures. *Prescott v. Wells*, 6, 89

20. *Sale of tramway by creditor of lessee.*—Plaintiff and defendants leased adjoining coal lands to the same lessees. A tunnel was made through plaintiff's land to reach defendant's, on which was the outlet of the slope; rails were laid by lessees on the track in the tunnel. Their leasehold interest in the defendant's land was levied on, with the appurtenances, consisting of a breaker, etc., "and railroads in and about and connected with said mines." The rails had been removed from the track, and plaintiff claimed that they had been delivered to him for rent. In an action of trover for them, *held*, that whether the rails were included in the levy was properly submitted to the jury. *Heffner v. Lewis*, 6, 98

21. *Machinery during term of lease.*—Machinery erected by a lessee to carry on his business is personal property during his term; it may be sold on execution, and the purchaser may remove it before the expiration of the term. *Id.*

22. *Hoisting machinery belongs to lessee.* *Dobschuetz v. Holliday*, 6, 108

23. *Facts of the case—Machinery placed by purchaser under executory contract.*—Vendee made contract to purchase mines, to receive title on payment of purchase money. He entered and put up machinery (engine, boilers, etc., affixed to the soil). He made default in payment of purchase money. Afterward the vendor became bankrupt, and his estate was sold. *Held*, that this machinery passed to the assignee of the vendor. *Moore v. Valentine*, 6, 112

24. *Vendee can not remove fixtures on default.* *Id.*

25. *Derrick not a fixture.* *Bewick v. Fletcher*, 6, 117

26. *Terms, imposed on removal, without consideration.*—Where machinery has not become a fixture the purchaser of the land can not impose terms on its removal by its owner, and if the latter agrees to terms without a consideration he is not bound by them or estopped from claiming title and possession. *Id.*

27. *Removal of mining improvements by miner, under mining customs of the King's Field.* *Wake v. Hall*, 6, 119

FIXTURES. *Continued.*

28. *A miner who has erected buildings, reasonably necessary for working his mine, is entitled, as against the surface owner, to pull down and remove the same at any time while he continues to work, or within a reasonable time after he has ceased to work, but not after he has allowed such reasonable time to expire. Id.*

29. *Injury to freehold by removing machinery.*—In removing from iron works, machinery, etc., allowed to be removed, the lessees may disturb such brick work as is necessary and are not bound to restore it to a perfect state, being liable in damages for any unnecessary disturbance of such brick work. *Foley v. Addenbrooke*, 8, 349

30. *A licensee has a right to remove his fixtures and other property of a personal nature. Desloge v. Pearce*, 9, 247

31. *Mortgaged boiler attached to mortgaged realty.*—The owner of a quartz mill mortgaged the same to B. Afterward he bought an engine and boiler, gave a chattel mortgage for the purchase money, and then transported them to his mill in another county and affixed them to the realty. *Held*, that the mortgage of the vendor had priority over the mortgage of B, notwithstanding the machinery became part of the realty. *Tibbets v. Moore*, 9, 349

32. *Machinery of ore-bank, part of realty. Ege v. Kille*, 10, 213

33. *Engine house, boiler and engine, placed on a mine for the permanent working of the same, become fixtures, and subject to the incidents of real estate. Roseville Co. v. Iowa Co.*, 16, 93

34. *Determined by intent.*—In determining whether machinery is a legal fixture, the intention of the owner in its attachment is to be considered, and if it appears from the nature of the articles affixed, the purpose in view, and the manner of their attachment, that they were designed to be permanent, they are to be treated as parcel of the realty. *Id.*

35. *A fixture may be parcel of the realty though placed on public land. Id.*

36. *Execution.*—Fixtures are not liable to sale on execution, as personalty. *Id.*

FLOODING.

1. *Owner liable for action of foreign water brought on his land or for diversion of natural flow. Rylands v. Fletcher*, 6, 129; *Smith v. Fletcher*, 6, 192

2. *Application of the rule—Reservoir tapped—Mine drowned. Rylands v. Fletcher*, 6, 129

3. *Upper mine may be worked to boundary. Smith v. Kenrick*, 6, 143

4. *Prior appropriation of lower, prevents flooding by upper claims. Logan v. Driscoll*, 6, 172

5. *Sic utere tuo.*—Because defendants' use of their claims may not be unlawful, is no reason to excuse the effect of such use upon the rights of others. It does not prevent the application of the maxim *sic utere tuo alienum non lædas. Id.*

6. *Injunction to restrain flooding, with accounting and allowance of expenses* where defendant has passed his boundaries. *Plant v. Stott*, 6, 175

FLOODING. *Continued.*

7. *Flooding mine by tapping river bed enjoined. Crompton v. Lea,*
6, 179
8. *Upper and lower mines on same dip. Id.*
9. *Statute of limitations where flooding ultimately results from original trespass. Williams v. Pomeroy Co.,*
6, 195
10. *Flooding one mine to save another, held, no defense. McKnight v. Ratcliff,*
11, 364
11. *Idem—The measure of damages was the actual injury sustained in delay, loss of time, damage to machinery, etc., and if the mine was irreclaimable, then the value of the estate and property; but merely speculative profits, supposed to have been lost, can not be included. Id.*
12. *Defendants misled by plaintiff's opinions.*—Where a point was presented by defendants, to the effect that if the plaintiffs had notified and informed the defendants that the water would escape before it could damage them, then any damages resulted from their own misrepresentations, for which they could not recover—it should have been affirmed, referring the special circumstances of the case to the jury. *Id.*
13. *Natural percolation from upper to lower mine.*—The natural percolation of water from one mine to another is not a matter as to which the owner of the lower mine has any right of complaint against the owner of the other mine. The owner of the upper mine has a right to work it as he likes, and his neighbor below can not complain unless he finds that the water has been turned into his mine by a channel or artificial arrangement. *Phillips v. Homfray,* 14, 678; *Crompton v. Lea,* 6, 179; *Lord v. Carbon Co.,* 15, 695
14. *Discharge of water into neighboring mine by bore-hole where same water would have ultimately reached plaintiff's mine without the aid of the bore-hole. West Cumberland Co. v. Kenyon,* 15, 208
15. *Land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally. Lord v. Carbon Co.,* 15, 695
16. *The owner above may quit at will and let the water go to his underlying adjoiner. Jones v. Robertson,* 15, 708

FLUME.

1. *Flumes are parcel of the ditch. Ellison v. Jackson Co.,* 4, 559
 2. *Appropriation pending construction of flume.*—Parties having the prior right to the waters of a stream by the commencement and partial completion of a ditch and flume have the right to use so much as is necessary to preserve their flume from injury while in process of construction. *Weaver v. Conger,* 6, 208
- See DITCH.

FORCIBLE ENTRY.

1. *Possession after forfeiture.*—The original locator will not be justified in making a forcible entry on mining ground, after forfeiture incurred, while it is in the possession of one who has entered, seeking to relocate it for the forfeiture. *Slavonian Co. v. Perasich,* 1, 541
- VOL. XVI—27.

FORCIBLE ENTRY. *Continued.*

2. *Statutory elements of forcible entry and detainer.*—The statute provides for two classes of cases: 1. An unlawful and forcible entry and detainer. 2. A lawful and peaceable entry with an unlawful detainer. The complaint must state one of these two causes. A complaint alleging a forcible detainer without alleging a forcible entry is bad. *Cox v. Groshong*, 6, 210

3. *Description.*—The complaint must describe the premises with reasonable certainty. A description of the land as "a certain range of lead ore and a strip of land, or piece on each side thereof twenty-five yards on each side running easterly and westerly" etc., is bad for uncertainty. *Id.*

4. *Practice—Waiver of defects.*—Proceeding to trial is no waiver of defects in complaint. *Id.*

5. *Strict construction.*—In forcible entry and detainer proceedings the provisions of the statute are to be strictly pursued. *Id.*

6. *Forcible entry by rightful owner.*—When one having title and right of entry enters the land by force the party dispossessed has no sure remedy at common law, but must resort to the statutory remedy by action of forcible entry. *Fuhr v. Dean*, 6, 216

7. *Title in controversy.*—It is doubtful whether in a pure action of forcible entry and detainer the title can be involved; but if it may be, and the cause arise before a justice of the peace, the statute allowing removal to the district court of cases raising questions of title, becomes applicable. *Henderson v. Allen*, 6, 227

8. *Pleading in justices' courts.*—An answer denying generally the allegations of a complaint is sufficient in an action before a justice of the peace. *Id.*

9. *Prospecting contract does not create relation of landlord and tenant.* *Id.*

10. *Possession essential to recovery—Mine remaining unworked.*—A party who has worked a mining claim, run tunnels and sunk shafts for prospecting purposes, but who has quit work and done nothing for some months except to leave his tools on the premises, and has never marked his boundaries—has not such possession as is essential to maintain forcible entry. *Laird v. Waterford*, 6, 230

11. *Entry on such claim by second prospector.*—And a second party peaceably entering upon such premises is not guilty of a forcible entry, nor does his refusal to yield possession on demand make him guilty of a forcible detainer. *Id.*

12. *Lessor's right of re-entry—Demand of rent.* *Miller v. Sparks*, 6, 231

13. *Necessary averments implied from record.*—In an action of forcible entry and detainer, it is necessary that the complaint should show that the defendant entered upon the possession of the plaintiff; but that which appears by necessary implication from the record is the same as if expressly averred. *Id.*

14. *Sufficiency of complaint.*—A complaint which alleges a forcible detainer, and also alleges a demand for possession when no such demand was necessary, does not, therefore, state two causes of action in the same count. *Id.*

FORCIBLE ENTRY. *Continued.*

15. *Title not at issue in this action.* *Boardman v. Thompson*,
6, 240
16. *The California precedents* are under a different statute, and inapplicable to Montana. *Id.*
17. *Writ of assistance—Entry during absence of party.*—An entry is not given by law until there has been an adjudication of the right; in such case a writ of assistance will issue; but until then a party entering in the temporary absence of another is guilty of a forcible entry under the statute. *Id.*
18. *Limitation Act.*—Quiet possession by defendant for one year bars the action; until such period has elapsed, the court will not presume acquiescence from mere silence. *Id.*
19. *Statutory appeal.*—The Landlord and Tenant Act of March 21, 1772, gives no appeal from proceedings before the justices and inquest. *Neumoyer v. Andreas*,
9, 292
20. *Practice on transfer to court of record.* *Id.*
21. *Nature of action of forcible entry.*—All that is necessary to sustain this action is, that defendant should forcibly and illegally have turned the plaintiff out of possession. It may be brought even against the legal owner. *Lorimier v. Lewis*,
12, 487
22. *Possession got by force—Nevada practice.*—Possession is not essential to enable the plaintiff to recover in an action to remove a cloud upon his title; and under the Practice Act, Sec. 256, the right of action to quiet title is given to any one in possession, so that in either case the objection that plaintiff obtained possession *vi et armis* can not be inquired into. *Scorpion Co. v. Marsano*,
12, 502
23. *Writ of possession against acquitted defendants* in a forcible entry case allowed with mandamus to compel its service. *Fremont v. Crippen*,
6, 221

FORFEITURE.

1. *The neglect to comply with a district rule* does not operate to work a forfeiture, unless the district rule so provides. *Bell v. Bed Rock Co.*, 1, 45; *McGarrity v. Byington*,
2, 811
2. *Burden of proof.*—A party who insists upon forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise or easement forfeited or abandoned, is upon first principles bound to establish the fact or facts upon which his asserted claim or right depends. *Oreamuno v. Uncle Sam Co.*, 1, 82; *McKnight v. Kreutz*,
6, 805
3. *Pleading*—Forfeiture must be specially pleaded.—Abandonment may be proved under the general issue. *Morenhaut v. Wilson*,
1, 53
4. *Discovery of facts warranting forfeiture.*—The objection that a discovery may subject the corporation to the loss of its charter is not sufficient to support a general demurrer to the whole bill. *Robinson v. Smith*,
3, 448
5. *Forfeiture distinguished from abandonment.* *St. John v. Kidd*
4, 455; *Wiseman v. McNulty*,
6, 826
6. *Forfeiture considered as aiding development.*—The condition of

FORFEITURE. *Continued.*

development should be attached to every mining claim. The policy of the government is to encourage the extraction of the precious metals, and courts should maintain that construction of mining customs which will accomplish this end. This policy considered with relation to enforcing forfeitures. *King v. Edwards*, 4, 480

7. *Colorable forfeiture*.—The declaration of a forfeiture without cause of forfeiture proved, amounts (as against third parties) to no more than a voluntary surrender. *Dobschuetz v. Holliday*, 6, 108

8. *Territory can not take forfeiture*. *Territory v. Lee*, 6, 248

9. *Forfeiture is to be enforced at option of lessor*. *Doe v. Bancks*, 6, 278

10. *Party can not plead his own wrong*.—A party can not plead his own broken covenants as effecting a forfeiture to his advantage. *Id.*

11. *Condonation of one forfeiture* does not prevent a landlord from asserting his right upon a subsequent cause of forfeiture occurring, unless through his failure, lessee has been induced to make expenditures. *Id.*

12. *Forfeiture not favored*.—Contracts as well as statutes providing for forfeiture must receive a strict construction, and the facts to support the forfeiture must be clear and not left to inference or argument. *Von Schmidt v. Huntington*, 6, 284; *McKnight v. Kreutz*, 6, 305

13. *Forfeiture for desertion*.—The articles provided for forfeiture of shares for desertion and for absence without leave. Upon the facts stated in the opinion the court held, the shares, both money and labor, of parties who had not only left, but tried to break up the company, to be rightfully forfeited; "desertion" and "absence without leave" distinguished. *Von Schultz v. Huntington*, 6, 284

14. *Pleading forfeiture under district rules*.—An answer in ejectment averring that whatever right plaintiffs may have had was forfeited by non-compliance with the rules of the diggings is insufficient in not setting forth the rules specifically. *Dutch Flat Co. v. Mooney*, 6, 303

15. *Forfeiture a legal conclusion* upon which no issue can be taken; the facts upon which the forfeiture was based should be stated. *Id.*

16. *Condition distinguished from covenant*.—A coal lease contained a provision that the lessee should do no injury to the surface nor spoil the coal itself, the lessor reserving the right to send an expert into the mine to see in what manner the business was therein done. Held, not a condition for breach of which lessors might enter, but a covenant for breach of which lessee was liable in damages. *McKnight v. Kreutz*, 6, 305

17. *Expressio unius, exclusio alterius*.—Where, in a lease, causes of forfeiture are specified, it is not to be inferred that there are other grounds of forfeiture, not declared to be such. *Id.*

18. *Entry presumed to be for breach, where breach existed*. *Id.*

19. *Delay, held no waiver of forfeiture*. *Id.*

20. *Laches of ousted tenant*.—A coal lease provided that in default

FORFEITURE. *Continued.*

of payment of monthly rents lessors should have full power to dissolve the lease. After working several months, mostly in fixing and cleaning out the mine, which was an old one, making partial payments of rent, but without the monthly returns, which were not demanded, he was ousted at night by breaking the lock, and the entry, in this manner, by one of the defendants under another lease. He delayed bringing suit for over two years: *Held*, that this was "not the way" to enforce the forfeiture; but that the delay in bringing suit was fatal to plaintiff's recovery. *Kreutz v. McKnight*, 6, 314

21. *Forfeiture of lease by neglect to operate.*—Failure to work for sixteen months, during which period it would have been profitable to work the ore bed, was a breach of condition, for which lessor, or his assignee, might re-enter and declare forfeiture. *Stockbridge Co. v. Cone Iron Works*, 6, 317

22. *Forfeiture not effected without entry—Facts showing entry. Id.*

23. *Forfeiture for default on assessments—Strict construction.*—Where tenants in common entered into contract to develop their claims by running a tunnel, each party to be assessed once in four weeks, and for neglect to pay assessments the shares of those in default were to be forfeited to the company: *Held*, that if such forfeiture could be enforced the rule of strict literal construction should be applied. That the assessments must be levied once in four weeks and not at other times. That the "company" would not be considered to mean the remaining members. *Wiseman v. McNulty*, 6, 323

24. *Strict performance required of party claiming forfeit. Id.*

25. *Necessary parties.*—To allow of forfeiture there must be a person in being, competent to take, at the time the forfeiture accrues. *Id.*

26. *Premature call of meeting to assess stock.* *Westcott v. Minnesota Co.*, 6, 336

27. *Verbal notice of meeting.*—Where the articles of association provided for a written or printed notification of meetings, a verbal notice is not sufficient to bind shareholders who did not waive notice by appearing. *Id.*

28. *Conditions precedent to forfeiture.*—The right to forfeit shares in any joint stock undertaking must come from the law, and can only be exercised in the manner prescribed by law. In this case the articles of association are the law governing the right of forfeiture, and all the conditions precedent, which are made by them, must be strictly complied with, or the attempted forfeiture is void. *Id.*

29. *Covenant for working china clay—Re-entry upon breach.* *Kinsman v. Jackson*, 6, 352

30. *Breach does not operate forfeiture.* *Vanatta v. Brewer*, 6, 353

31. *Where a term is demised in clear and apt words, it can be defeated only by words as strong and express as those by which it is created. Id.*

FORFEITURE. *Continued.*

32. *Covenant distinguished from condition and limitation—Facts of the case—Injunction.*—Upon motion to dissolve an injunction restraining the defendants from sinking a shaft, it appeared that the defendants were assignees of a lease of the premises which contained a clause that the lessees should commence a search for minerals within two months from the date of the lease, and should have twelve months from such date to explore the land for ores or minerals: *Held*, that the clause was neither a limitation upon the term granted, nor a condition, upon breach of which the term should end, but was a simple covenant, which in the absence of a stipulation that a breach should work a forfeiture, would not have that effect; and that the injunction must be dissolved. *Id.*

33. *Forfeiture not enforced in equity.* *Funk v. Haldeman*, 7, 203;
McCormick v. Rosst, 15, 483

34. *Forfeiture not retrospective.* *Lykens Coal Co. v. Dock*, 8, 571

35. *Time—Breach of covenant without forfeiture.*—A clause in an oil lease to commence operations by a day certain, is of the essence of the covenant, so far as to give an action for damages after the expiration of the lease; but it is not a condition, the breach of which forfeits the lease. *Barker v. Dale*, 8, 597

36. *No forfeiture by tenant's agreement to convey.* *Griffin v. Fel-lows*, 8, 657

37. *Forfeiture on non-payment of royalty.*—A lease provided that default of payment of royalty should be considered "an abandonment of this lease." *Held*, that the expression was equivalent to "considered abandoned" or "void," and only to be operative at the option or election of the lessor. *Bowyer v. Seymour*, 9, 67

38. *Lessee not relieved in equity after forfeiture.* *Wilmington Co. v. Allen*, 9, 106

39. *Re-entry presumed where right to re-enter exists.* *Doe v. Wood*, 9, 183

40. *Forfeiture, a question of fact.* *Beatty v. Gregory*, 9, 24

41. *Forfeitures are deemed in law odious, and will not be enforced unless clearly apparent to courts.* *Mount Diablo Co. v. Callison*, 9, 617

42. *Judicial sale of term.*—Forfeiture of lease does not accrue—the lease providing against non-assignment—when the assignment is by judicial sale. *Patterson v. Silliman*, 11, 327

43. *Forfeiture under mining laws a question for the court.* *Fairbanks v. Woodhouse*, 12, 86

44. *Shares forfeited between sale and suit.*—Where, after a fraudulent sale of mining shares and after demand to rescind and suit brought to set aside the sale, the shares became forfeited, both vendor and vendee, plaintiff and defendant, having full notice of the calls, the loss will fall upon the party against whom the decree ultimately goes. There is no engagement on the part of a plaintiff to maintain such property during a suit to set aside a fraudulent sale thereof. *Maturin v. Tredinnick*, 13, 15

45. *Inequitable conduct preventing relief from forfeiture.*—Where an agreement is simply one for the payment of money, a forfeiture of

FORFEITURE. *Continued.*

land, chattels or money, incurred by non-performance will be relieved against, unless the defaulting party, by his inequitable conduct, has debarred himself from such relief, or the special circumstances show that relief should not be granted. *Sunday Lake Co. v. Wakefield*,
16, 97

46. *Extension of inquiry beyond the particular covenant.*—Though the right of re-entry is reserved only for the breach of one covenant in a lease, breaches of other covenants may be considered in determining whether relief against the forfeiture should be granted. *Id.*

47. *Above rule applied to the facts.* *Id.*

See ABANDONMENT.

FORMER RECOVERY.

1. *Former recovery no bar, when.*—A former recovery is no bar to an action, when the causes of action are not the same, though many of the facts in the two actions are identical. *Hardenbergh v. Bacon*,
1, 352

See RES ADJUDICATA.

FRAUD.

A—IN GENERAL.

B—BY VENDOR.

C—BY VENDEE.

D—BETWEEN ASSOCIATES.

E—BY OR UPON AGENTS.

F—AGAINST CREDITORS.

G—BONA FIDE PURCHASER.

H—LACHES.

I—PRACTICE—PARTIES—EVIDENCE.

A. In General.

1. *Opportunity to inspect.*—The plaintiff can not recover on the ground of fraud, when, before the bill was rendered, he had every opportunity to inspect, and no concealment was used or representation made to induce the plaintiff to believe that the iron was of any particular grade, or to prevent an examination into its quality. *Carondelet Works v. Moore*,
2, 625

2. *Items inducing belief of value are not matters of mere opinion.* *Gifford v. Carvill*,
6, 558

3. *Defense to purchase money note.*—Such representations, if fraudulent, on proper pleadings may be given in evidence to defeat notes given in consideration of stock purchased on such representations. *Id.*

4. *Collusion with lessee to forfeit and renew.* *Wood v. Londonderry*,
6, 464

5. *Location of claim after negotiations conceding title to it.* *Allen v. Gilreath*,
6, 471

6. *Essentials to materiality of misrepresentations.*—Representations, to be such as will entitle a party to recover on the ground of deceit, must not only be false, but must also be intended to deceive,

FRAUD—In General. Continued.

and must have been the inducement to the party to part with his money. *McAleer v. McMurray*, 6, 606

7. *Fraud existing, but unknown to plaintiff.*—To maintain an action for deceit on the ground of fraudulent misrepresentations it must be affirmatively shown that they came to the plaintiff's knowledge and were the inducing cause of his loss. *Id.*

8. *Purchase on letters without personal knowledge by either party.* *Cooper v. Lovering*, 6, 663

9. *Second contract tainted by original fraud.* *Davis v. Henry*, 6, 680

10. *Cheating by oversizing the measure for weight wagons.* *Brandling v. Owen*, 4, 129

11. *Alleged assertions contrary to what was visible*, concerning "objects of sense" which the party alleged to have been defrauded had in fact seen, are not to be considered as grounds for equitable interference. *Jennings v. Broughton*, 12, 405

12. *Pretended sale for cash—Sight draft.*—Where a bill to rescind a sale of land averred that the intended consideration was cash, to which end a sight draft had been given that had not been paid, and whose drawers were insolvent, and this was not denied, it was held that there was equity in the bill and that it stood confessed. *Carter v. Hoke*, 12, 579

13. *If persons make assertions of facts as to which they are ignorant*, they become in a civil point of view, as responsible as if they had asserted that which they knew to be untrue. *Reese River M. Co., Inc., v. re*, 13, 20

14. *Sudden appreciation of mineral lands—Value no proof of fraud.* *Bean v. Valle*, 13, 292

15. *Suppressio veri, as to salines.*—A party having discovered salt water on the land, by artifice prevented knowledge of the fact reaching the vendor until he had been able to consummate the purchase. Held that the purchase must be set aside. *Bowman v. Bates*, 6, 363

16. *Inspection, where defect is latent.*—The fact that an article sold was inspected by the purchaser will not avoid the liability of the vendor when it is a different thing from that which the purchaser intended to buy, and its true character could not be ascertained by mere inspection. *Cornelius v. Molloy*, 6, 457

17. *Concealment of knowledge* that the article sold was not in fact what it appeared to be, or of such circumstances as would induce a purchaser to test the article before buying, is an undue concealment, for which the seller is liable in case for the deceit. *Id.*

18. *A reckless statement of the capacity of a mine* put forth with a view to influence persons to take shares, and not upon a fair and reasonable belief in its truth: Held, to amount to fraud. *Glamorganshire Co. v. Irvine*, 6, 565

19. *Conversations and conduct.*—The defendant had taken plaintiff over the land, crossed the streams in controversy and the ditch, impressing the fact that the irrigation facilities were complete: Held, that the conduct, as well as the conversations, was to be considered by

FRAUD—In General. *Continued.*

the jury in determining the question of fraud. *Banta v. Savage*, 7, 118

20. *Caveat emptor not applied to active fraud. Id.*

21. *Sellers pretending to be buyers. Getty v. Devlin*, 7, 119

22. *Fraud, dependent on construction of the consideration clause.*

A lease provided for its sole rental a royalty on the stone quarried. The "Committee" found that it was a case of constructive fraud if the true construction was that the tenant could have the occupation while under no obligation to work the quarries. *Held*, that the fraud being found to be hypothetical, depending on the construction of the contract, compelled the court to construe the contract upon that point, and they found that the tenant was under obligation to work, *ut supra*. *Brainerd v. Arnold*, 8, 478

23. *Promise not performed, no false pretense. Grove v. Hodges*, 2, 698

24. *Misrepresentations made to third parties.*—Where fraudulent representations are relied on to defeat a contract, proof of other like representations made by the same party about the same time to other persons in and about the same project, is admissible to show the intent with reference to the false representations made to the plaintiff. *Perkins v. Prout*, 2, 189

25. *Opinions and statements of facts distinguished. Kimmins v. Wilson*, 2, 159; *Jennings v. Broughton*, 12, 405; *Banta v. Savage*, 7, 118

26. *Consideration of facts held to constitute fraud* in a stock broker's contracts, acts of a party being held equivalent to misrepresentations on his part. *Day v. Holmes*, 2, 276

27. *Misrepresentations, without intent to defraud. Crump v. U. S. Co.*, 3, 454

28. *Suppression of material facts vitiates the contract as fully as the false affirmation of facts. Id.*

29. *Subsequent failure of the mine.*—If the representations were materially true, and no facts suppressed, the subsequent failure of the mine does not impair the right of the vendors to enforce the contract. *Id.*

30. *Misrepresentation defeats stipulation. Maute v. Gross*, 11, 128

31. *Representations as to thickness of coal beds.*—To bill for specific performance of agreement to take a lease of coal mines, defendant answered—misrepresentations as to the depth and thickness of the beds, which are matters that are known to vary. The court made an issue to the jury, whether any false representations were made, and whether, if made, they were relied on by defendant, and the issue being found for plaintiff, the court refused to disturb the finding. *Clapham v. Shillito*, 6, 481

32. *Rule to determine whether party has acted on the false representations made. Id.*

33. *Matters of inference or opinion.*—Misrepresentations are to be considered with reference to the subject-matter, which may be uncertain, and all knowledge of it only inference of an uncertain nature. *Id.*

FRAUD—In General. *Continued.*

84. *False representations based on mistake.*—Representations both material and false will vitiate a contract, although a fraudulent intent be wanting, as in case of representations made on mistaken belief.

Warner v. Daniels, 6, 436

85. *Essential elements of remediable misrepresentations stated.* *Southern Co. v. Silva,* 15, 485

86. *Misrepresentations not operating to deceive, no defense.* *Whiting v. Hill,* 6, 693

87. *Mere praise of property is no fraud.* *McDowell v. Simms,* 6, 446

88. *Liability for placing company on the Stock Exchange by false representations.* *Bagshaw v. Seymour,* 6, 510

89. *Action against director fraudulently placing company on Stock Exchange.* *Bedford v. Bagshaw,* 6, 514

40. *Misrepresentations made for general circulation.*—A man may not be liable for the remote results of every untrue statement he may make; but he is liable for the consequences of a fraudulent misrepresentation intended to be generally circulated, to those persons who are injured by acting upon it. *Id.*

41. *Liability of director for fraudulent Prospectus.* *Clarke v. Dickson,* 6, 533

42. *Sole indictment.*—It is no defense to such an action that the false representations contained in the prospectus were not the sole inducement to the plaintiff to buy shares in the concern. *Id.*

43. *Distinction between fraudulent and innocent misrepresentations stated.* *Leonard v. Peeples,* 6, 538

44. *Slight misrepresentations sufficient in connection with bogus organization.* *Bradley v. Poole,* 6, 581

45. *False representations made by stranger,* and known by the vendor, he is responsible for, though the stranger is in no sense an agent. But where the sale is made without the vendor's knowledge of the fraudulent representations having been made, the consequences can not be charged to the vendor, and the sale will stand. *Law v. Grant,* 7, 56

46. *Idem.*—But such presumption can not be indulged if the conduct of such stranger can be accounted for on a hypothesis consistent with the vendor's innocence. *Id.*

47. *Facts of the case.*—*Purchase advised by spiritual medium and witch-hazel wizard.* *Id.*

48. *Use of name of trustee.*—The mere allowance of the use of a party's name as trustee of a company whose stock afterward proves to be worthless, is not sufficient to maintain an action charging personal liability, without proof of knowledge of such fact or of any false representations. *Morgan v. Skiddy,* 7, 74

49. *Misrepresentations immaterial or not relied on.* *Tuck v. Downing,* 7, 83

50. *Misrepresentation as to price paid.*—*Held,* 1. That a false statement of the price paid is not of itself a material representation. 2. That in connection with the exhibition of the deed it could not have misled. *Id.*

FRAUD—In General. Continued.

51. *Asserted knowledge.*—The charge of fraudulent intent is maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. *Chatham Co. v. Moffatt*, 16, 103

52. *The fraud exists in stating that the party knows the thing to exist when he does not know it to exist*, and if he does not know it to exist, he must ordinarily be deemed to know that he does not. *Id.*

53. *Opinions and statements as to amount of ore in sight.* *Southern Co. v. Silva*, 15, 485; *Chatham Co. v. Moffatt*, 16, 103

B. By Vendor.

54. *Vendors not bound to disclose original costs or profit.* *Densmore Co. v. Densmore*, 3, 509

55. *Purchase of stock induced by forged telegram.*—Fraud allowed to go to the jury on circumstantial evidence. *Rees v. Jackson*, 5, 615

56. *Sale of stock to minor* will be set aside without regard to fraud. *Becker v. Hastings*, 2, 688. But the adults in same case held bound to the rule *caveat emptor*, all having equal opportunity of knowledge. *Id.*

57. *No presumption that false statement was knowingly made.*—The fact that a representation made by a seller was false, raises no presumption that he knew that it was false. *Southern Co. v. Silva*, 15, 485

58. *The false statement by vendor of the cost to him of an article which he is about to sell is a case of moral but not of legal turpitude, and will not sustain an action for deceit.* *Scott v. Kittanning Co.*, 3, 159

59. *Proof of understanding in cases of fraud.*—On an issue between A and B as to whether B was induced to pay A money upon his false representations that it was needed for a certain stated purpose, if A contend that B, when he made the payment, did not understand that the money was to be used for that purpose, but for another purpose, it is competent for B to testify that he paid the money, supposing that it was to be applied to the first purpose. *Brown v. Pease*, 3, 47

60. *Coal vein in river bed—Judicial cognizance of the non-practicability of mining.* *Dale v. Roosevelt*, 6, 369

61. *Sale of coal vein in river bed—Relief from exploitation.*—Held, that as there was no such mine as represented, the purchaser was not bound to work it to determine whether it should yield the prescribed quantity, and that the vendor should be perpetually enjoined from prosecuting at law for the annuity. *Roosevelt v. Dale*, 6, 377

62. *Relief based on representations false but not fraudulent.*—Relief may be granted in equity against any deed or contract founded on representations found not to be true, although the representations were based on misapprehension of facts and were not fraudulently made, on the ground of mistake. *Id.*

FRAUD—By Vendor. *Continued.*

63. *Concealment of the fact of unprofitable working.* *Haywood v. Cope*, 6, 499
64. *Representations to stock buyers, as to original cost.* *Simons v. Vulcan Co.*, 6, 633
65. *Salting the dump—Fraudulent samples.* *Davis v. Henry*, 6, 680
66. *Defects in salt-well known, by test, to the vendee.* *Whiting v. Hill*, 6, 693
67. *Secret payment by vendor to one of the purchasers: Held, breach of trust, although mine worth the full price.* *Beck v. Kantorowicz*, 6, 480
68. *Misrepresentation of title.*—Babcock held a treasurer's deed, and represented to Case that he had examined the title and found all right, and that the title was good; Case, saying that he would take Babcock's word for it, bought the land without examination: *Held*, that there was a relation of trust and confidence, and Babcock was bound to exhibit the truth as it existed. *Babcock v. Case*, 6, 618
69. *Ignorance no defense to party assuming to have knowledge.*—Babcock's ignorance of the facts, he having undertaken to state them truly, would not redeem a falsehood in any material matter from being a fraud that would avoid the contract. *Id.*
70. *Sole inducement.*—The false statements relied on to sustain the action need not have been the sole inducement to the purchase. *Morgan v. Skiddy*, 7, 74
71. *Lode extension.*—The prospectus represented the Bates lode as parcel of the property of the company, when in fact the company only held a piece of property located as an extension of the Bates lode. *Held*, a material misrepresentation. *Id.*
72. *Latitude allowed vendor.*—A vendor trying to sell his own property has a right to "puff" it in the most extravagant terms, the other party being at full liberty to exercise his own judgment about it. *Tuck v. Downing*, 7, 83
73. *Matters of opinion.*—Where the representations complained of are necessarily mere matters of opinion as to the future prospects of a mine, the rule, *caveat emptor*, applies, and the sale will not be set aside whether the vendee has or has not availed himself of an opportunity to examine the premises. *Id.*
74. *Composition metal sold for copper.*—Seller liable for deceit if buyer accepted his representations. *Cornelius v. Molloy*, 6, 456
75. *Hearsay representations of value.*—Representations of the value of a mine made by vendor upon hearsay, and known by vendee to be hearsay, can not be said to be false or fraudulent, unless the vendor knew or had reason to believe them to be untrue. *Davidson v. Jordan*, 7, 54
76. *Purchase after inspection, not avoided on proof of statements merely exaggerated, previously made by vendor.* *Tuck v. Downing*, 7, 84

C. By Vendee.

77. *Discovery of gold concealed by intervening purchaser.*—While

FRAUD—By Vendee. Continued.

the vendee was in possession, a valuable gold mine was discovered on the premises. A third party went to the vendor, from whom they concealed the discovery of gold, and also misrepresented the willingness of vendee to take the land, and the obligation upon vendor to convey: *Held*, that an equity might exist against such third party, independent of the obligation of the vendor to make conveyance. *Falls v. Carpenter*, 6, 897

78. *Vendee surrendering property to adverse claimant.*—One who buys machinery which is in litigation, giving his note in payment therefor, commits fraud on the vendor by delivering possession and executing conveyance of his right thereto, to the party holding the adverse title, upon mere demand without legal compulsion, and can not afterward plead, as a defense to the note, the fraudulent conduct of the vendor in selling the property. *First Nat. Bank v. How*, 12, 134

79. *Idem—Pretended failure of consideration.*—In an action upon a note, the maker does not show failure of consideration by alleging that the payee had no title to the property in payment of which it was made, where it further appears that the maker had delivered to a claimant, without legal necessity, the property which he had bought and received from the payee. *Id.*

80. *Public declarations before purchase, as evidence of fraud.* *Harris v. Tyson*, 14, 635

81. *No rescission between vendor and vendee, both concealing their opinions of the real value.* *Williams v. Spurr*, 7, 17

82. *Fluctuations of mining property* considered with reference to disproportion between original price of the mines and the subsequent valuation for stocking purposes. *Morgan v. Skiddy*, 7, 74

D. Between Associates.

83. *Confidential relation of members of association—Accounting.*—From the time persons form or begin to start such association, they stand in a confidential relation to each other, and to future members, and none of them can purchase property for the purpose of the association, and sell it at an advance, without a full disclosure of all the facts. Such persons must account to the company for the profits. *Densmore Co. v. Densmore*, 3, 569

84. *Organizer making profit on purchase—Recovery by purchaser.* *Short v. Stevenson*, 6, 629

85. *Good faith required between associates.* *Id.*

86. *Collusion between trustee and purchaser.*—Confirmation of sale set aside upon showing of arrangement by purchaser to take in one of the trustees making sale, as a partner. *Bailey v. Watkins*, 6, 887

87. *Sale by subscriptions headed by decoy subscribers—Parties to bill for accounting in such case.* *Getty v. Devlin*, 7, 119

88. *Partner renewing lease for his exclusive benefit.* *Clegg v. Edmondson*, 8, 180

89. *Attorney of successive adventurers seeking purchase, favoring one of them—Facts of the case stated.* *Tatham v. Lewis*, 6, 670

90. *Fraud, a defense to action for calls.* *Bulch y Plum Co. v. Baynes*, 6, 596

FRAUD—Between Associates. *Continued.*

91. *Status of original shareholders.*—The holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief in equity against the fraudulent conduct of the directors. *Blain v. Agar*, 6, 393

92. *Unknown shareholders.*—Some of the shareholders in a joint stock company may file a bill to have their deposits repaid without making all the other shareholders parties, if they are ignorant of their names. *Id.*

93. *False representations by one subscriber does not bind others.* *Kimmins v. Wilson*, 2, 159

94. *"Original owner."*—A prospectus of an oil company stated that the company had purchased their land from the "original owner." *Held*, that this was not a term of art, to be explained by experts. The term implied that no profits were added to the price paid by the company on account of an intermediate buyer, etc., and excluded the idea of a purchase at speculative prices. *Simons v. Vulcan Co.*, 6, 633

95. *Directors making profit out of company an illegal proceeding, for they are agents.* *Id.*

96. *Associate buying into adjoining mine.* *Pierce v. Pierce*, 15, 675

97. *Late familiar and confidant not to be lightly charged.*—All presumptions are against fraud; it can not be lightly charged against one in whom implicit confidence has been placed, especially if a near relation; such a person is fairly entitled to a favorable construction of any conduct that is reasonably consistent with integrity, and an accusation that may seriously affect his business reputation should not be held proved by circumstances that are merely ambiguous. *Id.*

98. *Associates in fraud liable for each other's receipts.* *Getty v. Devlin*, 7, 113

99. *Private interest of directors subservient to official duty.*—The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They can not, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests. *Wardell v. U. P. R. R. Co.*, 7, 144

100. *Credit Mobilier contract not enforced.* *Wardell v. U. P. R. R. Co.*, 7, 144; *Ahl's Appeal*, 8, 639

101. *Fiduciary parties making profit.*—Promoters, directors or agents of a company are not permitted to make profit out of it in buying lands or dealing with it. *Ahl's Appeal*, 8, 639

E. By or upon Agents.

102. *Concealment of facts by agent avoids sale from principal to him.* *Norris v. Tayloe*, 1, 383

103. *Agent dealing on two contracts—One on which to sell, the other on which to settle—Duress.* *Jackson v. Allen*, 7, 127

104. *Fraud of agent unknown to principal does not affect the latter's liability.* *Law v. Grant*, 7, 56

105. *Agent taking lease in his own name.*—If one agree by parol to

FRAUD—By or upon Agents. Continued.

buy land for another, and he does buy the land, and pays for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement and compel him to make title to the principal; so of an agreement to procure a lease for another. In these instances the statute of frauds does not apply. *Hargrave v. King*, 8, 408

106. *Misrepresentations by corporate agent* do not bind or affect the officers of the corporation in their individual capacity, so as to impose liability upon them in an action where they are sued personally. *Arthur v. Griswold*, 7, 46

107. *False representations must be inducing cause.*—False representations, such as make corporate officers personally liable to a person advancing money on them, must not only be false to the knowledge of the parties making them, but must be the inducing cause to the person parting with his property. *Id.*

108. *Fraud of agent against stranger of no avail to principal.* *Hardy v. Stonebraker*, 7, 10

109. *Facts of the case—Agent to consummate fraud, allowed his hire.*—A agreed with B to let him have \$3,000 if he, B, would procure a purchaser of A's lead land at \$3,000. He procured a purchaser at this price by fraudulently concealing the fact that he was A's agent, and fraudulently advising the purchaser, as a friend, that the land was worth \$8,000 and could not be bought for less, which was not the truth. But the purchaser sought no relief. *Held*, that the original contract, although the commission was large, was not void, and that A could make no use of the fraud of his agent in procuring a purchaser, as a defense to his agreement to pay the \$3,000 commission. *Id.*

F. Against Creditor.

110. *Deed intended to hinder creditors.*—A mining company being about to obtain judgment against one of its directors, he made conveyance of all his assets to a third party: *Held*, that the deed was intended to delay, hinder or defraud creditors; (2) that it was not necessary for the company to have a lien or charging order to induce the court to set it aside; (3) but that in the absence of such claim the court could merely set aside the conveyance without distributing the assets. *Reese River Co. v. Atwell*, 6, 626

111. *Conveyance to defraud creditors—Equity.*—A conveyance given for the purpose of putting property beyond the reach of creditors is fraudulent, and the court of equity will leave the parties where it finds them. *Kinney v. Consolidated Va. Co.*, 10, 459

G. Bona Fide Purchasers.

112. *Sale in fraud of creditors—Knowledge of purchaser.*—When a debtor has sold a mining claim in fraud of his creditors, as alleged, the sale can not be set aside for inadequacy of price alone, if such inadequacy of price was not known to the purchaser, and he was otherwise a stranger to the vendor's fraudulent intentions. *Henry v. Everts*, 5, 608

113. *A mistake will not be reformed to the hurt of an innocent intervening purchaser.* *Kinney v. Con. Va. Co.*, 10, 459

FRAUD. *Continued.**H. Laches.*

114. *Rescission.*—To avoid a contract on the ground of fraud, the offer to rescind should be made as soon as the fraud is discovered. The vendee can not remain quietly enjoying the property for a long period of time after the discovery of fraud, and afterward repudiate the contract. *Blen v. Bear Riv. Co.*, 3, 435

115. *Vendee's knowledge of value.*—The statement by a vendee of stock that he did not suppose that its property was put in at the par of its shares, *held*, no such sufficient knowledge as to prevent rescission in a case where the material facts in proof showed a case of active fraud. *Bradley v. Poole*, 6, 581

116. *Condonation.*—If a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own, he can not recover back the money from the seller. *Campbell v. Fleming*, 6, 395

117. *Discovery of further fraud.*—A right to repudiate, so lost, is not revived by the subsequent discovery of another incident in the same fraud. *Id.*

118. *Matters preventing equitable relief.*—Where the facts justify equitable relief, the only matters barring such relief are: 1, great and unexplained delay in seeking it; 2, the existence of adequate relief at law; or, 3, such a position of the property in controversy as to render it impracticable to grant redress. *Warner v. Daniels*, 6, 436

119. *Delay of stockholders to assert fraud of organizers.* *Evans' Appeal*, 8, 255

120. *Waiver of right to rescind on account of misrepresentations.* *Macbryde v. Weeks*, 13, 847

121. *Knowledge of fraud as waiver—Burden of proof.*—A defendant who relies upon the neglect of the plaintiff to repudiate his fraudulent transaction, as a waiver of the fraud, has the burden of proving the plaintiff's knowledge of the fraud, and the time of its discovery. *Pence v. Langdon*, 13, 33

122. *Notice of fraud perpetrated by a "friend."*—The law will not impose on a man the necessity of absolutely ignoring the persistent asseverations of his "friend and neighbor" by whom he has in fact been defrauded, even though third parties may have told him that he had been "sold." *Marston v. Simpson*, 13, 36

I. Practice—Parties—Evidence.

123. *Latitude of evidence.*—In investigations as to fraud great latitude of inquiry is always allowable. *Simons v. Vulcan Co.*, 6, 633

124. *Evidence that the plaintiff was a poor man, was properly rejected.* *Harris v. Tyson*, 14, 635

125. *General statement no proof of specific fraud.*—A declaration by defendant that it was his intention "to monopolize the chrome business," is not evidence in an action brought to set aside a conveyance of a chrome right in the land of the plaintiff. *Id.*

FRAUD—Practice, etc. Continued.

126. *Essential requisites in action for deceit. Byard v. Holmes,*
6, 657
127. *Relation between the fraud and the damage must appear.*
Id.
128. *Fellow-shareholders not liable for directors' fraud. Mexican Co., In re,*
2, 36
129. *Action, in form ex contractu, based on fraud.*—Where parties have so acted, an action in form *ex contractu* can be maintained only by showing fraud in dealing with the company, by reason of which they should not *ex æquo et bono*, retain the moneys wrongfully obtained from it. *Simons v. Vulcan Co.,*
6, 633
130. *By-bidder—No laches allowed in favor of rescission.*—Conceding the employment of a by-bidder at an auction sale to be a fraud, yet the vendee can not set it up as ground of rescission unless he abandon forthwith; he can not first prospect the property and then come in to set the sale aside. *McDowell v. Simms,*
6, 476
131. *Necessary parties.*—If several of the shareholders assign, by deed, their deposits to others, and appoint the latter their attorneys, for recovering their deposits, the assignees can not sue on behalf of themselves and their assignors, but the latter, however numerous, must be made parties. *Blain v. Agar,*
6, 888
132. *In cases of fraud courts of equity have concurrent jurisdiction with courts of law. Blain v. Agar,*
6, 893
133. *Relief in equity against directors.*—The shareholders in a joint stock company are entitled to relief in equity where the conduct of the directors has been fraudulent or amounts to a violation of the terms on which the company was formed. *Blain v. Agar,*
6, 888
134. *Custom not to pay if mine fails* "so unreasonable that it was probably enforced by the bowie knife." *Leonard v. Peeples,*
6, 588
135. *Joint buyer colluding with vendor—Silent conspirator. Page v. Parker,*
6, 544
136. *"Jumped" claim—General allegations of fraud in pleadings not sufficient.*—Held, that while a contract procured by fraud may be rescinded, a general allegation of fraud is not sufficient; the particular circumstances which constitute the fraud must be stated; the allegation that defendant was not at any time the "lawful" owner, according to the mining laws of said mining district, is not such a statement of facts as would authorize a rescission. *Arnold v. Baker,*
7, 111
137. *False pretense of irrigating facilities—Appurtenances—Constructive admissions in pleading. Banta v. Savage,*
7, 118
138. *Cancellation of fraudulent lease.*—Held, upon bill filed by the corporation, that the lease should be canceled. *Mahony M. Co. v. Bennett,*
7, 183
139. *Defense of fraud where land was sold in parcels.*—Several tracts of mining land were sold under one contract, but separate deeds naming distinct considerations were given for each tract. Held, that fraud and want of consideration in the sale of one tract could be set

FRAUD—Practice, etc. *Continued.*

up as a defense in a suit to foreclose a purchase money mortgage upon another of such tracts. *Hicks v. Jennings*, 7, 133

140. *Defense runs against heirs.*—And that such defense could be set up against the heirs and distributees of the mortgagor where such mortgage had been transferred to them as an advancement. *Id.*

141. *Fraud renders a contract voidable*, but does not make it void. *Foreman v. Bigelow*, 13, 269; *Byard v. Holmes*, 6, 599

142. *Defendant refunding to co-defendant after suit brought.* *Hoyt v. Smith*, 12, 326

143. *Action for false averment of value—Ex delicto.*—A complaint averring that the defendant, by false representations of the value of a lode, induced plaintiff to purchase and pay a sum of money therefor, and the receipt of the deed from defendant, and claiming general damages exceeding the consideration paid, is an action *ex delicto*, and not *ex contractu*. *Ahrens v. Adler*, 12, 114

144. *Fraud not charged in his complaint will not avail a plaintiff.* *Brainerd v. Arnold*, 8, 473

145. *Form of complaint in action based on sale of mine, induced by fraud.* *Ahrens v. Adler*, 12, 114

146. *Extent of recovery for fraudulent sale.*—The plaintiff's recovery is not restricted to the amount of the consideration paid by him. *Id.*

147. *Insufficient averment of fraud.*—The allegation in a pleading that a certain suit was corruptly and fraudulently dismissed, is not sufficient. The facts constituting the fraud must be set forth. *Bank v. How*, 12, 134

148. *Civil imprisonment for fraud.*—A judgment of imprisonment will not be sustained upon a general averment that defendants "are guilty of fraud." The facts upon which the charge of fraud is based must be specifically alleged in the complaint. *Payne v. Elliott*, 14, 515

149. *Any presumption from commingling of accounts may be explained by the circumstances under which made.* *Pierce v. Pierce*, 15, 675

150. *Measure of damages.*—In an action to recover damages which the plaintiff has suffered by reason of the purchase of stock in a corporation, which he was induced to purchase on the faith of false and fraudulent representations made by the defendant, the measure of damages is the loss which the plaintiff sustained by reason of those representations—such as the money which he paid out, and interest, and all outlays legitimately attributable to the defendant's fraudulent conduct; but it does not include the expected fruits of an unrealized speculation. *Smith v. Bolles*, 16, 159

FURNACE.

1. *Furnace Supply—Exchange of ores—Digging for sale.*—A party entitled to take ore to the extent of the supply of one furnace, where the furnace requires a mixture of ores, may rightfully take out ore to the extent of the quantity which the furnace can consume, for the purpose of using, in part for the furnace, and in part for exchange for other ores, but may not extract ore for general sale. *Alden's Appeal*, 13, 139

GARNISHMENT.

1. *Working claim pending redemption.*—The proceeds of a tort not garnishable. *Johnson v. Lamping*, 14, 450

GIFT.

1. *The title to a mining claim obtained by gift* can not be assailed by one who is neither a creditor of the grantor, nor in the place of creditors. *Meyers v. Farquharson*, 8, 217

GOLD DUST.

1. *Gold dust left with innkeeper by guest.* *Mateer v. Brown*, 7, 156
2. *Garnishment of bailes of amalgam for coining.* *Walling v. Miller*, 7, 165
3. *Surreptitious carriage of gold dust* to avoid paying expressage, is a gross fraud on the common carrier, who is not liable in case of loss. *Hellman v. Holladay*, 7, 168
4. *Contract, after fraud known*, renders the carrier liable, for the value of the article, if lost. *Id.*
5. *Proof of rightful freight paid* is matter for the jury, and if the carrier knew the package contained gold dust, he is liable for it, without regard to the rates charged. *Id.*
6. *Contract subsequent to note.*—An agreement reducing the rate of interest on a note payable in gold dust, extending time of payment and setting apart property to secure such payment: *Held*, no merger of the original contract to pay the gold dust. *Creighton v. Vanderlip*, 7, 172

GUARANTY.

1. *Guaranty on ore-digging contract—Delivery—Notice.*—Plaintiff was digging ore for William Church, under a written contract to dig it as fast as it was wanted, when he refused to dig any more unless he was secured on the contract, whereupon the defendants indorsed a guaranty upon the contract. The contract was then handed to a third party to be delivered to plaintiff. *Held*, that the delivery was perfect without notice to defendants that plaintiff had accepted their guaranty; that notice of refusal by the original contractor to pay was not necessary to be given to the guarantor before action; that notice of the amount due was not necessary to be given to the guarantors. *Bushnell v. Church*, 2, 479
2. *Proof of insolvency.*—The insolvency of the original debtor being proved, a deed of indemnity from such debtor to his debtors is admissible to prove both the time of such insolvency, and that the guarantors had received no damage from want of notice. *Id.*
3. *Guarantor bound by principal's acts.*—The directions given by the original contractor to his employes are admissible in evidence against, and binding upon the guarantors of the contract. *Id.*
4. *Previous suit against principal.*—Defendant guaranteed that Burke should fulfill a contract for sinking an oil well. Burke did not fulfill the contract. It was not necessary to liquidate the damage against Burke before proceeding on the guaranty. *Janes v. Scott*, 7, 181

GUARANTY. *Continued.*

5. *Insolvency of principal.*—Where the principal is insolvent at the maturity of the debt, neither judgment and execution, nor demand upon him, nor notice of non-payment to the guarantor, are necessary before suing the latter. *Id.* 7, 181
6. *Identity lost* by numerous transfers. *Strong v. Lyon*, 13, 554
7. *Renewals having been made in ignorance of the facts* did not extend the guaranty to other purchases. *Id.*

GUARDIAN AND WARD.

1. *Fair mining securities allowed as credits to guardian.* *Ogle's Estate, In re*, 7, 189

HIGHWAYS.

1. *If fee vested in the authorities, they hold the minerals.* *Hawesville v. Hawes*, 7, 193
2. *Legislature may vest the fee of streets.* *Id.*
3. *Road can not be condemned over possessory claim* without compensation. *Robertson v. Smith*, 7, 196
4. *Prior in time, prior in right, applied to highways.* *Id.*
5. *Right of way—Stone.*—A gift of the right of way (the right to open a public street) is not a gift of the rock and other materials within the boundaries of the way. *Smith v. Rome*, 7, 306

HOMESTEAD.

1. *Mining on homestead*, not interfering with the homestead enjoyment, is not dependent on wife's consent. *Harkness v. Burton*, 9, 318

HUSBAND AND WIFE.

1. *The marital rights of the husband* in property conveyed to his wife, are only such as regard the rents and profits, and they may be defeated by limiting the grant to her sole and separate use. *Hopkins v. Noyes*, 15, 287

HYDRAULICS.

1. *Irregular flow caused by hydraulics* must not interfere with rights of prior appropriator of water of same stream. *Phoenix Co. v. Fletcher*, 15, 185
2. *Injury to prior appropriator, when not actionable.* *Id.*

INCORPOREAL HEREDITAMENTS.

1. *Construction of complicated oil land contract—License made exclusive and irrevocable by the agreement of the parties.* *Funk v. Haldeman*, 7, 303
2. *Grant of iron ore limited to a certain furnace, construed to create an incorporeal hereditament.* *Grubb v. Grubb*, 7, 226
3. *An incorporeal easement* is extinguished by unity of title and possession. *Coleman's Appeal*, 14, 231
4. *A thing corporeal* can not be appended to a thing corporeal. *Id.*
5. *When an incorporeal right exists.*—It is only where the right to mine is not exclusive that it may be classed as an incorporeal right or easement in the nature of a license. *Williams v. Gibson*, 16, 243

See EASEMENT.

INDICTMENT.

1. *Amending caption*.—Where the style of the court is misdescribed in the caption of an indictment, it may be amended on the motion of the district attorney. *Farnum v. United States*, 4, 192
2. *Description of letters in indictment for secreting same*. *Id.*
3. *Indictment for larceny of ore—Severance from realty*. *State v. Berryman*, 4, 199
4. *Bailee of oil*.—Construction of indictment in many counts for larceny by bailee of oil or orders for oil. *Hutchison v. Com.*, 4, 209
See CRIMES.

INFANT.

1. *A female infant, by statute of Colorado, attains her majority at eighteen, and at that age she may execute a promissory note*. *Jackson v. Allen*, 7, 127

INJUNCTION.

- A—JURISDICTION.
- B—IN GENERAL—TRESPASS AND OTHER INSTANCES.
- C—PARTIES.
- D—PLEADING.
- E—PRACTICE.
- F—NOTICE.
- G—PRAYER.
- H—DISSOLUTION.
- I—DISCRETION—INSOLVENCY.
- J—TITLE AND SUIT AT LAW.
- K—MANDATORY.
- L—ACCOUNTING.
- M—PAST INJURIES.
- N—LACHES—ESTOPPEL.
- O—APPEAL.
- P—CONTEMPT.

A. Jurisdiction.

1. *Injunction to stay waste*.—This remedy suggested, but not acted upon, by the chancellor. *Dean of Ely v. Warren*, 4, 238
2. *Waste and trespass*.—The jurisdiction of chancery to restrain by injunction and compel an account, in cases of the destruction or taking away of the substance of the estate, is no longer restricted to waste, but is extended to trespass. *Thomas v. Oakley*, 7, 254
3. *Equity jurisdiction to restrain trespass*.—An injunction will be granted to restrain a trespass in order to quiet the possession, or when there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the mischief; but in ordinary trespasses, or where the remedy at law is adequate, equity refuses to interfere. *Bracken v. Preston*, 7, 267
4. *Trespass in digging or mining on the land of another* is within the cognizance of a court of equity when committed by a mere wrongdoer, or where a party exceeds a limited authority. *Id.*
5. *The threatened use of water for irrigating, to the injury of another, is that class of "continually recurring grievances" which only equity can redress*. *Union M. Co. v. Dangberg*, 8, 118

INJUNCTION—Jurisdiction. *Continued.*

6. *Ascertainment of damages.*—The fact that the value of the ore taken could be readily ascertained does not deprive a court of equity of its right to interfere by injunction. *Anderson v. Harvey*, 7, 291

7. *Injunction pending trial of plea to jurisdiction.*—The plea to jurisdiction does not oust the jurisdiction of the court; in a case of threatened irreparable mischief the court will issue an injunction to stay the mischief, pending the argument or issue, and accelerate the hearing or argument upon the issue made. *Fremont v. Merced M. Co.*, 7, 332

8. *The institution of a suit at law to try title*, is not indispensable to the jurisdiction in equity to protect the property. *U. S. v. Parrott*, 7, 336

9. *Jurisdiction beyond county.*—A court of equity, having the parties within its jurisdiction, may restrain by injunction a trespass upon lands lying in another county. *Munson v. Tryon*, 7, 469

10. *Jurisdiction over lease beyond the State.* *Sunday Lake Co. v. Wakefield*, 16, 97

B. In General—Trespass and other Instances.

11. *General principles.*—A preliminary injunction is a restrictive or prohibitory process to compel the party to maintain his status merely until the matters in dispute shall be determined—only granted (in addition to the case of invasion of unquestioned rights) for the prevention of irreparable mischief, which can not be repaired under any standard of compensation. *Mammoth Co's Appeal*, 7, 400

12. *Incidental grounds for injunction.* *Munson v. Tryon*, 7, 469

18. *Clear equity required before injunction issues.* *Waring v. Cram*, 12, 280

14. *There must be equitable circumstances stated*, to obtain a remedy by injunction. *Coker v. Simpson*, 7, 330

15. *Injunction against opening a mine*, may be granted when the working of a mine already opened would not be restrained. *Grey v. Northumberland*, 7, 250

16. *Abuse of privilege.*—Injunction issued to restrain the unlimited taking of stone by defendant, who had a restricted right to take stone for certain uses in connection with certain lands. *Thomas v. Oakley*, 7, 254

17. *Distinction between mining, and other injunction cases stated.* *McBrayer v. Hardin*, 7, 288

18. *Preservation of property pending litigation.*—Where there is reasonable ground to apprehend irreparable mischief pending the litigation, and the title be matter of doubt, the courts should restrain both parties or appoint a receiver. *Merced M. Co. v. Fremont*, 7, 314

19. *Exceptional nature of mines, timber, etc.*—The general rule is that a court of equity takes no jurisdiction in cases of mere trespass, not even by granting a temporary injunction. But there is an established exception in the cases of mines, timber, and the like, in which cases injunctions will be granted to restrain the continued commission of acts by which the substance of the estate is destroyed or carried off. *Irwin v. Davidson*, 7, 337

INJUNCTION—In General, etc. *Continued.*

20. *Trespass enjoined as well as waste.* *Mitchell v. Dora*, 7, 250

21. *Courts of equity do not now make distinctions between trespass and waste,* but will apply the remedy by injunction wherever a trespass is attended with irreparable mischief or a multiplicity of suits, the same as if it were a technical waste. *Chapman v. Toy Long*, 1, 497; *Smith v. City of Rome*, 7, 806; *Merced Co. v. Fremont*, 7, 818

22. *Special case of gold mines.*—The principle upon which destructive trespass is restrained applies to gold mines as well as others. If a party remove, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate; another material circumstance is the absence of any mode of fixing the amount of damage to the mine. *Merced M. Co. v. Fremont*, 7, 818

23. *Ore already severed.*—The removal of the fruits of past waste may be enjoined. *U. S. v. Parrott*, 7, 886

24. *Technical, distinguished from destructive trespasses.* *Thorn v. Sweeney*, 7, 564

25. *Trespass—Irreparable injury.*—An injunction will not be granted in aid of an action of trespass, unless it appear that the injury will be irreparable, and can not be compensated in damages. *Waldron v. Marsh*, 7, 805

26. *Taking ore, a destructive trespass.*—The taking of ore from land of little or no value, except for such ore, is a trespass going to the destruction of the estate. *Anderson v. Harvey*, 7, 291; *U. S. v. Parrott*, 7, 886

27. *No trespass or threat to commit trespass—no injunction.* *Champion Co. v. Wyoming Co.*, 16, 145

28. *Irreparable injury—Multiplicity of suits.*—Mines, quarries and timber are protected by injunction, upon the ground that injuries to, and depredations upon them are, or may cause, irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners. *West Point Co. v. Reymert*, 7, 528

29. *Prevention of multiplied suits.*—To prevent multiplicity of suits, a court of equity will decree an account of the damages or waste at the same time with an injunction, and make a decree to settle the entire controversy. *Allison's Appeal*, 11, 142

30. *It is not necessary to stay till waste is actually committed,* where the intention appears and the person insists on his right to do it. *Gibson v. Smith*, 15, 111

31. *Threatening to continue.*—Where the acts complained of do not make a case, it follows that a threat to continue them can not aid the matter. *Sherman v. Clark*, 7, 488

32. *Removing pillars in adjoining mine enjoined.*—Equity will restrain one or two adjacent mine owners from removing the supports which prevent the surface of his mine from caving in when it appears that such removal will result in the destruction of his neighbor's mine. *Lord v. Carbon Co.*, 15, 696

33. *Injunction against mixing and removing ores held as security.* *Glidden v. Norvell*, 12, 170

INJUNCTION—In General, etc. *Continued.*

34. *Idem*—Destroying security not permitted although defendants be solvent. *Id.*

35. *Waste on mortgaged mine.*—Ordinary mining and cutting necessary timber is not waste of the incumbered premises, and will not be enjoined. *Capner v. Flemington Co.*, 7, 263

36. *Oil pipe-line in river under drawbridge.*—Injunction refused on the facts stated. *New Jersey Co. v. Standard Oil Co.*, 7, 625

37. *Oil pipe-line over railroad track*—No injunction against nominal trespass to aid a competing oil carrier. *Central R. R. Co. v. Standard Oil Co.*, 7, 604

38. *Ditch upon public domain not enjoined.*—Under § 2339, U. S. Rev. Stats., the defendants had the right of way for the construction of a ditch over the public domain, subject only to the liability of paying for all damages done by them to plaintiff's possession. And since the allegation of defendant's insolvency is fully denied in the answer, they ought not to be enjoined from doing upon the public domain what the paramount law declares they may do. *Rivers v. Burbank*, 7, 583

39. *Cutting ditch enjoined.*—Repeatedly cutting a mining ditch is a destructive trespass, liable to be enjoined in the exercise of the power of a court of equity. *Derry v. Ross*, 1, 1

40. *Possessor of water right may have injunction.* *Barkley v. Tieleke*, 4, 666

41. *Diversion of water*—First appropriator protected to extent of his original ditch. *Higgins v. Barker*, 7, 525

42. *No injunction against slight damage from tailings.*—Slight injury to land, and water rights below, by the fouling incidental to placer mining, will not be enjoined. *McCauley v. McKeig*, 16, 1

43. *Injunction to restrain transfer of stock* illegally issued by a secretary of the company may issue, but only on a proper showing of the illegality of the issue and of the proposed transfer. *Sherman v. Clark*, 7, 483

44. *Sale of stolen stock, enjoined.* *Sierra Nevada Co. v. Sears*, 7, 549

45. *Quarries* are not different from mines in regard to injunctions. No distinction on the question of comparative value can be made. *Thomas v. Oakley*, 7, 254

46. *Injunction to prevent drowning of colliery.*—The court has power to enjoin a party from discontinuing pumping at a colliery and prevent its being drowned out, pending a case for specific performance of contract for lease; but it will not exercise that power when the pumping has already been a long time discontinued. *Strelley v. Pearson*, 7, 618

47. *Removing stones from sea-bottom enjoined.* *Cowper v. Baker*, 7, 253

48. *Injunction against building unchartered railroad.*—A railroad company organized for the benefit of coal mines, and not within any of the statutes authorizing the condemnation of lands for railroads connecting with coal mines, should be enjoined from constructing its road across private property. *Edgewood Railroad Co.'s Appeal*, 5, 406

INJUNCTION—In General, etc. *Continued.*

49. *Injunction staying proceedings at law.*—Although the District Courts have both equity and common law jurisdiction, yet the practice should be the same as if their different powers were conferred upon separate and distinct courts; and the proper method of procuring the postponement of the trial of an action at law, upon the ground that a suit is pending in chancery which will be decisive of the action at law, is by injunction from the court of chancery to stay proceedings at law. *Gear v. Shaw*, 7, 648

50. *Coal lessees enjoined and still held to their covenants.* *Schuylkill & Dauphin Co. v. Schmoele*, 7, 480

51. *Requisites preliminary to injunction.*—No injunction ought to be allowed where the remedy is complete at law; it is granted only to prevent injury (although an account for past injury may be incident), and there must be a reasonable probability that a real injury will occur unless the writ be granted. *Sherman v. Clark*, 7, 488

52. *Injunction, controlling meaning of contract at trial.*—The injunction in this case modified so as to permit the defendant to proceed with his suit at law, but restraining him from setting up at the trial any other meaning of the contract than that indicated by the court. *Firmstone v. De Camp*, 10, 489

53. *The court can not license a trespass, nor compel a party to an exchange of property, upon the pretense of convenience or necessity.* *Gregory v. Nelson*, 12, 124

54. *One who claims an exclusive right to mine under verbal lease, must prove a clear case on application for injunction.* *Clegg v. Jones*, 7, 572

55. *General rules applicable to injunctions.*—Injunctions are to prevent irreparable mischief and stay consequences that could not be adequately compensated; their allowance is discretionary and not of right. They call for good faith in the petitioner, and may be withheld if likely to inflict greater injury than the grievance complained of. *Edwards v. Allouez M. Co.*, 7, 577

C. Parties.

56. *Injunction at suit of stockholder* lies to control a corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the corporate trust. *Wright v. Oroville Co.*, 3, 558

57. *Idem.*—The court will interfere to relieve an injured stockholder from loss after such an act has been done, provided no superior equity has intervened, nor the rights of innocent third parties attached. *Id.*

58. *Tenant for life* having made a lease of coal mines, amounting to a forfeiture, can not join the remainderman in a bill for an injunction. *Wentworth v. Turner*, 7, 249

59. *Surety can not rescind, discarding principal.* *Emmons v. McKesson*, 7, 409

60. *Flooding ditch*—Defendants jointly enjoined, though not jointly responsible for damages. *Blaisdell v. Stephens*, 7, 599

61. *Parties to bill for injunction*—Parting with their interest before decree.—Parties in interest must be before the court, and where the

INJUNCTION—Par'ties. *Continued.*

complainants, lessees of a lead mine, had procured a temporary injunction to restrain the defendants from working the leased premises, and before the final hearing the lease had expired and had not been renewed, and the lessor had sold his interest in the premises, it was held error to decree a perpetual injunction without first bringing in the real parties in interest. *Laird v. Boyle*, 12, 82

62. *Right to injunction as between tenants in common of the same mine.* *Kahn v. Old Telegraph M. Co.*, 7, 559

63. *Discharged agent enjoined by his former principal from interfering with his successor's duty.* *Flagstaff M. Co. v. Patrick*, 4, 19

64. *Injunction to prevent interference with possession in such a case will be granted on a well-grounded fear.* *Id.*

65. *Dispute between lessees.*—In a dispute as to their rights between parties working under different leases on the same coal veins, no injunction can be granted in advance of the settlement of their rights at law, except to prevent irreparable mischief or injury. *Mammoth Vein Coal Co.'s Appeal*, 7, 460

66. *Lessee enjoined from converting the soil into brick.*—Lessee for years, though without impeachment of waste, may not destroy the land to the injury of the reversioner. Injunction issued to prevent the taking of the clay for brick. *Bishop of London v. Web*, 7, 247

67. *Holder of equitable title, when not entitled to injunction to stay waste.* *Gillett v. Treganza*, 7, 433

D. Pleading.

68. *Requisites of bill—Insufficient case for interlocutory writ.*—Where a bill was brought alleging a continuing trespass by mining copper ore, showing that complainants had been disseized, and praying an injunction pending an action for forcible entry and detainer, and for an account for mineral exsected, and for decree that defendants surrender possession and the complainants be quieted in their title, and it appeared that the defendants were in possession under claim of right: *Held*, that the bill did not state a case entitling them to relief; that ejectment was the proper remedy with a preliminary injunction on a proper bill showing the pendency of such action to try title, and that after recovery therein the plaintiffs could obtain satisfaction by an action for mesne profits. *Bracken v. Preston*, 7, 268

69. *Sufficiency of affidavit alleging irreparable injury.*—It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the court how and why it would be so; otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right. *Waldron v. Marsh*, 7, 805

70. *Irreparable injury.*—Taking away the minerals is in itself an irreparable injury; and the mere statement of this fact is a compliance with the ruling that the complaint must state *how* the injury is irreparable. *Merced M. Co. v. Fremont*, 7, 313

INJUNCTION—Pleading Continued.

71. *Denying the equities of the bill.*—Where the answer denies directly and positively, upon personal knowledge, the allegations of the bill, it is a denial of the equity, and acting upon such answer as evidence, an injunction ought to be dissolved in the absence of extraordinary circumstances, such as waste, destruction, trespasses, etc.; but where fraud, forgery and antedating are distinctly charged in the bill, the denial of such charges upon information and belief is not a denial of the equity of the bill, and can not defeat the motion for injunction or cause the dissolution of one already granted. *U. S. v. Parrott*, 7, 836

72. *General allegations insufficient if equities denied.*—A party who claims the right to the waters of a ditch, and avers that defendants are diverting the same and thereby causing irreparable damage, is not entitled to an injunction if the answer denies the equity of the bill, unless some equitable circumstances beyond the general allegation of irreparable injury be shown, such as a threatened destruction of the property or the like. *Burnett v. Whitesides*, 7, 407

73. *Injunction against diversion of water—Pleading.*—In the complaint it was alleged that plaintiff had for several years conveyed water down a certain gulch for mining purposes, and had acquired a prior right to the enjoyment and use of the water; that defendants had diverted the water and deprived plaintiff of its use, and that defendants wrongfully claim some pretended and fictitious right to the use of the water. *Held*, that the allegation of defendants' pretended right did not prejudice the right of the plaintiff to an injunction. *Tuolumne Co. v. Chapman*, 11, 34

74. *Irreparable nature of injury.*—The irreparable character of the injury is a necessary legal inference from the facts admitted—that defendants are taking the gold. *Moore v. Ferrell*, 7, 281

75. *Denial by answer taken as true.*—A complete denial by the answer is taken as true upon a motion to dissolve an injunction when heard upon bill and answer alone. *Magnet M. Co. v. Page M. Co.* 7, 540

76. *Irreparable injury, how pleaded.* *Leitham v. Cusick*, 7, 548

77. *Irreparable injury* may not be averred in terms without stating the facts which produce such result. *Thorn v. Sweeney*, 7, 564

78. *Allegations and proofs on motion for injunction.*—The rule that the proofs must correspond with the allegations, applies to the trial of a cause on its merits, and does not apply to proceedings on a motion for an injunction, where the answer is regarded simply as an affidavit. *Kahn v. Telegraph M. Co.*, 7, 559

79. *The failure to verify an injunction bill*, is of no importance except on the motion for injunction, and a verification can be allowed when such motion is made. *Glidden v. Norvell*, 12, 170

80. *Answer used as affidavit*—The apparent weight of authority is that an answer filed, after notice by the plaintiff of an application for a special injunction, can only be used as an affidavit; and the defendant can not insist that under such circumstances the plaintiff is confined in his injunction to the equity confessed in the answer. *Waring v. Cram*, 12, 280

INJUNCTION. *Continued.**E. Practice.*

81. *Special appearance*.—A court of chancery, where the sole object of a bill filed is to obtain an injunction, will not allow that object to be resisted without holding the defendant to a general appearance in the action. *Thornburgh v. Savage M. Co.*, 7, 667

82. *Destruction of fruit trees—Perpetual injunction after successive verdicts at law*. *Daubenspeck v. Grear*, 7, 429

83. *Plaintiff in possession*.—A party may have an injunction to restrain a threatened injury to real property, in the nature of waste, even though he is in possession of the land. *More v. Massini*, 7, 455

84. *Injunction which ends controversy not refused*. *McLaughlin v. Kelly*, 7, 446

85. *Court can not qualify its protection to suitors*. *Gregory v. Nelson*, 12, 124

86. *Idem—Injunction allowed upon bargain and condition*.—Where a party has shown his absolute ownership in a ditch, and the defendant shows no right to destroy it, the court can not, by its decree, allow a defendant to wash away the ditch upon building a flume and carrying its water, and giving bond to pay all damages. *Id.*

87. *Pennsylvania—Act of June 16, 1836, construed*. *Big Mountain Co's Appeal*, 5, 178

88. *Statute construed*.—Section 1182 of the Statutes of Nevada, relates to proceedings in a case pending, over which the court still has control. This case having gone beyond the reach of the court, the statute has no application. *Eureka M. Co. v. Richmond M. Co.*, 8, 145

89. *Where the affidavits are conflicting*, a preliminary injunction will be issued against alleged trespassers, leaving the question of the title to the property to be settled by a suit at law. *Cheesman v. Shreve*, 16, 79

90. *Destruction of tunnel enjoined, though both parties without title*. *Montana Co. v. Clark*, 16, 80

91. *Mandamus to compel enforcement of injunction*.—Mandamus will lie to the judge of the court below from whose court an injunction has issued to compel his issuing attachment to enforce the injunction, pending an appeal thereon. *Merced M. Co. v. Fremont*, 7, 309

92. *Injury wrought by stopping colliery by injunction*. *Clavering v. Clavering*, 14, 358

F. Notice.

93. *Notice of application—Discretion*.—The operations of large mining companies should not be arrested by injunction without notice, except in very plain cases, or where there is a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. *Capner v. Flemington Co.*, 7, 263

94. *Notice to dissolve*.—Service of the rule nisi upon complainant's solicitor, stating the grounds of the application and fixing the time and place of hearing the motion to dissolve an injunction in vacation,

INJUNCTION—Notice. *Continued.*

on the coming in of the answer, is sufficient service. *Moore v. Ferrell*,
7, 281

95. *Practice as to restraining order.*—The notice required by statute of an application for injunction does not apply to the case of a temporary restraining order, nor is an appeal authorized from an order granting or refusing the latter. *Lady Bryan Co. v. Lady Bryan M. Co.*,
7, 478

G. Prayer.

96. *Injunction against diversion.*—In a suit for the diversion of water, and praying for a perpetual injunction against its diversion, the defendants contended that the plaintiffs were not entitled to equitable relief, and that an action of ejectment would afford a legal remedy. *Held*, that the relief prayed for was appropriate to the case stated in the complaint. *Fabian v. Collins*,
5, 20

97. *A prayer for injunction is addressed to the discretion of the court*, and upon the facts, the court below having refused to grant the writ, the damage threatened not great, and the insolvency of the defendants denied, the action of the court below was approved. *Slade v. Sullivan*,
7, 419

98. *Restraining order governed by the complaint.*—A restraining order that goes further than the prayer of the complaint is improper, and should be set aside. *Leitham v. Cusick*,
7, 546

H. Dissolution.

99. *What answer will compel dissolution.*—Where the answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, the injunction will be dissolved; but where the trespass itself is not denied and the defense is in the nature of confession and avoidance, there is not a denial of the equities. *Moore v. Ferrell*,
7, 281

100. *Title and insolvency denied.*—Trespass will be enjoined in all cases where from the nature of the trespass or the circumstances of the parties the remedy at law is not adequate, but equity will not intermeddle with the title; where title is denied, courts will look more closely to the character of the trespass. It will not dissolve an injunction against gold mining upon an answer denying only the title and the allegation of insolvency. *Id.*

101. *Effect of answer denying all the equities of the bill* in mining trespass cases. *Magnet Co. v. Page Co.*, 7, 540; *Lady Bryan Co. v. Lady Bryan Co.*,
7, 478

102. *Answer upon information.*—Denials of the equities of a bill, if made only upon information and belief, will not justify the dissolution of an injunction, and the allegation of new matter upon information and belief is equally objectionable. *Cole Co. v. Virginia Co.*, 7, 516

103. *An ancillary writ should abate with the suit which it supported*, plaintiffs having failed to prove that which would have been necessary to maintain their suit. *Brennan v. Gaston*,
7, 424

104. *Water supply threatened, but not yet affected by continued*

INJUNCTION—Dissolution. *Continued.*

mining.—By mining operations, the defendant had not only sunk the level of a stream supplying plaintiff's mill, but also the level of the adjoining land. Plaintiff filed a bill for an injunction, but there had been as yet no actual diminution of the water to the mill, though threatened: *Held*, that the bill ought not to be dismissed, but should stand, with leave to apply further; the defendant meanwhile to give an undertaking not to diminish the flow. *Elwell v. Crowther*, 7, 433

105. *Lessees protected against trespassers—Writ expires with lease.*
Boyle v. Laird, 7, 301

106. *Averments in avoidance.*—On motion to dissolve, the court will consider matters set up in the bill by way of avoidance, as if stated by affidavit. *U. S. v. Parrott*, 7, 336

I. Discretion—Insolvency.

107. *Discretionary power in court.*—The granting or continuing of injunctions necessarily involves the exercise of a certain amount of discretion, the limits of which can not be fixed by any adjudged case. *Lyon v. Woodman*, 7, 494; *Merced Co. v. Fremont*, 7, 313

108. *Power to enjoin should be cautiously used.* *New Boston Co. v. Pottsville Co.*, 5, 118

109. *Necessity to justify its exercise.*—The necessity, to justify the writ, should amount to a case where compensation could not be made. *Id.*

110. *Due discretion* should be used in the granting of injunctions to restrain alleged irreparable mischiefs. When title is in dispute, the court should be more cautious; but in all cases, it is a matter of sound discretion. *Merced Co. v. Fremont*, 7, 313; *Gale v. Oil Run Co.*, 9, 1; and such discretion will not lightly be disturbed on appeal. *Efford v. South Pac. Co.*, 7, 557; *Hobart v. Ford*, 15, 286; *Sierra Nevada Co. v. Sears*, 7, 549

111. *No preliminary injunction where ultimate relief improbable.*—Upon an appeal against continuing an injunction, if the Court of Appeals perceives that the complainant has, and can have, no equity at final hearing, the bill will be dismissed. *Geiger v. Green*, 13, 324

112. *To stop the working of a mine by injunction*, is against public policy and private justice, where a receivership is practicable. *Falls v. McAfee*, 7, 689

113. *Title in dispute—Inconvenience to defendant, and his solvency.*—Where the title to property is in dispute, the injury occasioned to the parties respectively by the granting or refusing of the injunction will be compared, and the question of defendant's solvency will be considered. *Monte M. Co. v. Pond M. Co.*, 7, 459

114. *The allegation of insolvency is not necessary*, to procure the injunction in these cases; it is an element to be considered in connection with the amounts involved, and where it exists, is a proper subject for allegation in the bill. *U. S. v. Parrott*, 7, 337; *Merced Co. v. Fremont*, 7, 313

115. *Classes of irreparable injury—Insolvent defendants—Chinese.*—Extracting minerals, flooding lands and excavating ditches, are

INJUNCTION—Discretion—Insolvency. Continued.

in the nature of irreparable injuries, as to which the denial of injunctive relief is tantamount to the denial of all protection; and the fugitive nature of the defendants is also to be considered. *Henshaw v. Clark*, 14, 484

116. *Injunction against trespasser—Insolvency.*—Where a mere trespasser digs into, and works a mine to the injury of an owner, an injunction will be granted, and especially where such trespasser is insolvent. *Lockwood v. Lansford*, 7, 532

J. Title and Suit at Law.

117. *Proceedings to settle title required in aid of injunction.*—To entitle a party to injunctive relief, restraining defendants in possession from operating a mining claim, the plaintiff's title must be shown to be clear and undisputed, or it must appear that steps have been taken to establish the title at law, unless satisfactory reasons be shown for not doing so. *Telegraph M. Co. v. Central Smelting Co.*, 7, 555

118. *The reason for rule requiring an issue at law stated. Id.*

119. *Title to mine disputed.*—An injunction may issue to stay the working of a mine, although the legal title is in controversy, the object being to preserve the subject-matter of the litigation. *U. S. v. Parrott*, 7, 336; *Munson v. Tryon*, 7, 469; *Erhardt v. Boaro*, 15, 447; *Lyon v. Woodman*, 7, 493

120. *No injunction without speedy trial at law*, where the title is unsettled. *Grey v. Duke of Northumberland*, 7, 251

121. *Injunction on condition.*—Practice to allow injunction, placing plaintiff under condition to bring suit at law. *Stevens v. Williams*, 5, 549

122. *Plaintiff must support bill by ejectment. Irwin v. Davidson*, 7, 237

123. *No suit essential where title clear. West Point Co. v. Reymert*, 7, 528; *Anderson v. Harvey*, 7, 291

124. *No perpetual injunction before title settled. Lockwood v. Lunsford*, 7, 532

125. *Injunction after recovery in trespass.*—Held, that the verdict of the jury decided the question of title in favor of the plaintiffs, and that the refusal of the court to grant a perpetual injunction was error. *McLaughlin v. Kelly*, 7, 445

126. *When the plaintiff fails in his action at law*, his injunction goes with it. *Brennan v. Gaston*, 7, 424

127. *Injunction after verdict upon legal issues.*—In a suit in which equitable relief is sought by injunction, but which is entirely dependent upon the legal issues, the parties have a right to claim a jury to determine all the legal issues, and an injunction can only be granted when the verdict of the jury is in his favor who claims such equitable relief. *Ophir M. Co. v. Carpenter*, 4, 641

128. *Injunction pending specific performance. Geiger v. Green*, 13, 324

K. Mandatory.

129. *Diversion of water enjoined to extent of requiring affirmative acts by bulk-heading tunnel. Cole Co. v. Virginia Co.*, 7, 503

INJUNCTION—Mandatory. *Continued.*

180. *Preliminary injunction requiring substantive act.*—In special cases a court of equity will, on a preliminary application, issue an injunction, in a restrictive form, though its obedience would require the performance of a substantive act. *Cole Co. v. Virginia Co.*, 7, 516

181. *A mandatory injunction to prevent flooding*, forcing the defendant either to keep on pumping, or to build, perhaps, impracticable bulk-heads, refused on the facts, although defendant's predecessors in title had themselves got over the line, and made the aperture in question. *Lord v. Carbon Co.*, 15, 696

182. *Lease of brick field—Mandatory injunction to restore fence.*—Where the lessee of a brick field, contrary to the covenants in his lease, caused the fall of one of the fences bounding the field, by excavating the clay from under it: *Held*, that a mandatory injunction in a negative form should be granted to compel the restoration of the fence to its former condition. *Newton v. Nock*, 7, 611

183. *Mandatory injunction—Location prevented by means of forcible ouster.*—Upon bill for a mandatory injunction, restoring possession under the Colorado statute covering cases where a party has taken forcible possession of a mining claim, where plaintiffs had been prevented sinking their discovery and completing their location on account of their workings having been taken from them by defendants: *Held*, that the wrongful acts of defendants excused the sinking and other acts of location on part of plaintiffs. *Miller v. Taylor*, 9, 547

184. *An injunction can not be made to do the office of ejectment.* *Bullion Co. v. Eureka Co.*, 15, 449

185. *Practice on motion to be restored to possession.*—When the defendants have been deprived of the possession of mining ground by an officer acting under a restraining order, which was improperly issued, the judge who granted the same can not, upon application of the defendants without notice, restore them to the possession. *Leitham v. Cusick*, 7, 546

186. *Ex parte order changing possession.*—A judge at chambers has no power by *ex parte* order to induct defendants into possession of mining ground held by complainants, although after general verdict for the defendants. *Brennan v. Gaston*, 7, 426

187. *Surrender of possession not decreed.* *Bracken v. Preston*, 7, 267

L. Accounting.

188. *Disseized plaintiff.*—No injunction will be allowed in cases of trespass with an account, where the complainants, being disseized, can not maintain an action for mesne profits. *Bracken v. Preston*, 7, 267

189. *Facts sufficient to justify damages only, without injunction.*—The complaint stated that the defendants had constructed a mining ditch above that of plaintiff's, and had thereby diverted the waters of the stream which supplied them without any allegation of continuing injury, and claimed damages and a perpetual injunction: *Held*, that the case stated was sufficient to support an action for damages, but not to sustain the injunction. *Coker v. Simpson*, 7, 330

INJUNCTION—Accounting. Continued.

140. *Equitable relief and damages may be sought in the same complaint.* *More v. Massini*, 7, 455
 141. *Equity jurisdiction once acquired, extends to trespasses.* *Allison's App.*, 11, 143

M. Past Injuries.

142. *No injunction where the injury is already a past act, complete and not continuing.* *Clark v. Willett*, 4, 829; *Kahn v. Old Telegraph M. Co.*, 7, 560; *Mammoth Co's Appeal*, 7, 460

N. Laches—Estoppel.

143. *Injunction prevented by laches.*—To stop the working of a coal mine is a serious injury, and when it has been allowed to be worked for eight years, the expenditure is an equitable ground to prevent the hasty interference of the court. *Field v. Beaumont*, 7, 257
 144. *Restraining party claiming title—Laches—Expenditures.* *Real Del Monte M. Co. v. Pond M. Co.*, 7, 453
 145. *Injunction sought by party refusing to produce documents.*—Whether the court would grant it, doubted. *Field v. Beaumont*, 7, 257
 146. *Facts preventing preliminary injunction.*—A preliminary injunction ought not to issue to prevent the sinking of an oil well, inflicting certain injury upon the defendants, while the benefit to the complainant is not clear and his title also uncertain; nor where the wells sought to be enjoined, if meanwhile sunk, would be a benefit to the complainant instead of an irreparable injury. *French v. Brewer*, 11, 108
 147. *Injunction to restrain a provoked injury denied.* *Edwards v. Allouez M. Co.*, 7, 577
 148. *Motives of petitioner inquired into.* *Id.*
 149. *Plaintiff's standing—Speculative purchase from ousted claimant.*—The inadequacy of price paid by plaintiff seeking an injunction, and the fact of his purchasing while the mine was in the adverse possession of other parties, considered as reasons for refusing injunctive relief addressed to the discretion of the court, and injunction refused accordingly. *Lyon v. Woodman*, 7, 498
 150. *Relief as between trespassers.*—It is not sufficient to show the defendant a trespasser, where plaintiff has himself no better standing. *Id.*
 151. *Facts of the case stated—Insufficient showing for injunction—Claims bought with knowledge of adverse title.* *Id.*
 152. *Acquiescence in location of railroad—Lessee mining under roadbed.*—A railroad was constructed over certain lands without legal proceedings to condemn it, but without objection from the owners. Afterward proceedings to assess damages were commenced, but compromised and released. After the road was built, but before the release, coal veins undercropping the roadbed were let by the owner of the land. *Held*, that the title of the railroad company was by the original occupation without objection; that the release did not operate as an original conveyance, but as a discharge of the damages for the entry

INJUNCTION—Laches—Estoppel. *Continued.*

and occupation; and that the lessee of the coal took his lease subject to the right of way, and the coal company were enjoined from mining under the road. *Lawrence's Appeal*, 7, 542

O. Appeal.

153. *No jurisdiction in lower court to allow injunction pending appeal from order of dissolution.* *Eureka M. Co. v. Richmond M. Co.*, 8, 144

154. *Appeal no supersedeas to injunction.* *Merced M. Co. v. Fremont*, 7, 309

155. *An appeal does not stay the operation of an injunction, and its disobedience pending appeal may be punished as for contempt.* *Bullion Co. v. Eureka Hill Co.*, 15, 449

156. *But it is suspensive of any acts affirmative in character.*—And possession can not be taken under the terms of an injunction restraining interference with the possession of complainant when complainant is not, in fact, in possession. *Id.*

157. *Practice on appeal from preliminary order.*—A preliminary injunction must stand or fall according to the merits of the case when granted. *New Boston Co. v. Pottsville Co.*, 5, 118

158. *Practice on appeal—Stay refused pending appeal from order denying injunction.* *Central R. R. Co. v. Standard Oil Co.*, 7, 623

159. *Application to Supreme Court to enjoin pending the appeal.* *Eldridge v. Wright*, 7, 418

R. Contempt.

160. *Complainant ousting defendant after order of court enjoining defendant's mining.*—Where a complainant, out of possession, after obtaining an injunction to restrain the working of a mine by a defendant in possession, thereupon proceeded to oust the defendant, he was compelled, by order, to restore such possession to the defendant. *Held further*, that where the object of the writ was to preserve the property pending the litigation, the attempt, by complainant, to prevent the accomplishment of such object was a gross abuse of the process of the court, and might be considered as grounds for dissolving the writ, but could not be considered as a contempt of court. *Van-zandt v. Argentine Co.*, 7, 634

INJUNCTION BOND.

1. *Want of probable cause.*—In action upon a bond conditioned to indemnify the defendants "for all damages they might sustain by the wrongful suing out of an injunction" to stop their working of a certain gold mine, it is necessary for the plaintiffs to show a want of probable cause for the suit brought for injunction; and also in a legal sense, malice in bringing it. *Falls v. McAfee*, 7, 639

2. *Malice negatived.*—Where the party who sued out the injunction really and *bona fide* entertained the belief that he had just grounds for his suit, the idea of malice is negatived, and the action upon the bond can not be supported. *Id.*

3. *Nominal damages on the main case in action on bond not to bar proper assessment.* *Gear v. Shaw*, 7, 642

INJUNCTION BOND. *Continued.*

4. *Damages on dissolution of injunction—Sudden increase in product of the mine.*—An injunction was granted to restrain mining, and, some time after its dissolution, a new discovery was made, and a large quantity of ore raised from it. In assessing damages on the injunction bond: *Held*, proof that the use of the money for which the mineral might have been sold was worth to the parties more than legal interest, by way of enhancing the damages, should be rejected as ideal and speculative; and so, too, as to the proof of the subsequent discovery as tending to show what the parties might have realized had they continued mining, and the injunction had not been granted. *Id.*

5. *Idem.*—Damages upon the dissolution of an injunction are to be estimated with reference to the business of the party enjoined, and his profits at the time of the service of the writ, and not upon conjecture founded upon subsequent events not then known or contemplated. *Id.*

6. *Counsel fees and expenses of defending* the chancery suit are not a proper item of damages, to any greater extent than they were necessarily incident to or caused by the injunction. *Id.*

7. *Demand need not be proved.* *Id.*

8. *Oath of jury.*—In assessing damages on a bond with a condition after a finding that there has been a breach, it is correct to swear the jury to well and truly inquire of and assess the plaintiff's damages. *Id.*

9. *Measure of damages where building tramway had been enjoined.* *Morgan v. Negley,* 7, 658

10. *Measure of damages.*—In a suit upon an injunction bond in aid of a writ restraining defendants, who were three miners, and were prevented from working their placer claim for sixty days, the value of their labor, proved to be \$18 per day for the three men, allowed as proper damages. *Campbell v. Metcalf,* 7, 656

11. *Idem—Counsel fees.*—In suit upon an injunction bond given in support of a writ to prevent the working of mining ground, fees paid to counsel for services rendered in the trial of title are not recoverable. The recovery is restricted to the services of counsel in procuring the dissolution of the injunction. *Id.*

12. *Measure of damages—Expenses in protecting the mine.*—Money alleged to have been paid in the employment of men to hold a mine, so as to prevent it from being "jumped" during the existence of an injunction against working it, is not a legitimate item of the damages covered by the injunction bond sued upon. *Streeter v. Marshall Co.,* 7, 660

13. *Idem.*—It is a fundamental rule that no damages can be allowed which are not the actual, natural and proximate result of the wrong committed. *Id.*

14. *The injunction bond* affords an ample remedy for any damage sustained if the writ has been fraudulently obtained, and these matters are not grounds for filing a bill for an account. *Hall v. Fisher,* 12, 88

INNOCENT PURCHASER.

1. *Innocent holder of unregistered stock.*—If the holder indorses the certificate by writing his name upon the back, without causing the same to be transferred upon the books of the company, and thereupon delivers it to a third person who loses it, an innocent purchaser from the finder acquires no title to the stock. *Sherwood v. Meadow Valley Co.*, 13, 547
2. *Owner estopped from asserting title to stock.* *Stone v. Marge*, 13, 593
3. *Title of innocent purchaser of stolen certificates upheld.* *Winter v. Belmont Co.*, 13, 595
4. *Stock, though wrongfully issued, can not be declared void to the injury of an innocent holder.* *Smith North Am. Co.*, 13, 600

INSOLVENCY.

1. *Insolvency of vendee is of itself no ground to rescind a contract.* *Falls v. Carpenter*, 6, 396
2. *Test of insolvency.*—The test of the insolvency of the principal debtor is what might be recoverable by process—not what it might be supposed he would do voluntarily. *Janes v. Scott*, 7, 181
3. *Insolvency and laches* considered in their incidental relations to bill seeking injunction. *Irwin v. Davidson*, 7, 237
4. *Averment of insolvency, when unnecessary.*—When the injury goes to the destruction of the substance of the estate, which can not be specifically replaced, no allegation of insolvency is necessary to sustain an injunction. *More v. Massini*, 7, 455
5. *Where irreparable injury or inadequate relief at law is alleged, insolvency of the defendant need not be superadded.* *Sierra Nevada Co. v. Sears*, 7, 549

See INJUNCTION I.

INSPECTION.

1. *Inspection, with excavations, and allowance for expense of the same, ordered.* *Stockbridge Co. v. Cone Iron Works*, 6, 317
2. *View of mine permitted with use of means of access.* *Thornburg v. Savage Co.*, 7, 667
3. *Before granting an order for the inspection of a mine, the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected.* *Id.*
4. *Obstructions—Ventilation.*—Order for inspection of coal mines, the defendant being compelled to remove obstructions, and to open the air courses. *Lonsdale v. Curwen*, 7, 698
5. *Repeated inspection—Removal of obstructions.*—Form of order allowing repeated inspection, with viewers, and the power to remove obstructions, with the facts upon which it was based. *Walker v. Fletcher*, 8, 1
6. *Right to inspect, a usual covenant in a lease or sale by installments.* *Blakesley v. Whieldon*, 8, 8
7. *Inspection through shaft on foreign ground.*—A coal lease limited the right of lessee to mine within a certain distance of buildings. The lease did not reserve a right of inspection, and the mine was

INSPECTION. *Continued.*

worked through a shaft on other land of the lessee, without any openings on its own surface. *Held*, on bill to restrain the working of the reserved ground, that lessors should have leave to inspect and to enter through the defendant's shaft on defendant's ground, for that purpose. *Lewis v. Marsh*, 8, 14

8. *Objectionable individuals excluded as viewers. Id.*

9. *Inspection of colliery working across bounds.*—The owner of a mine sought relief for an alleged trespass in working an adjoining mine, into the plaintiff's mine. *Held*, that the plaintiff was entitled to an interlocutory order for an inspection of defendant's mine; that the denial by the defendant, of the trespass, was not a sufficient ground for refusing the order, and that it did not depend upon the balance of testimony. *Bennett v. Whitehouse*, 8, 17

10. *The court requires the best evidence of facts*, and if that evidence is only to be obtained by inspection, an inspection will be allowed. *Id.*

11. *The court has ancillary power to remove obstructions. Bennett v. Griffiths*, 8, 21

12. *Security required before granting the order for inspection*, by bond or deposit. *Id.*

13. *An adverse inspection will not be allowed until time given to defendants to answer the affidavits upon which it is based. Whaley v. Brancker*, 8, 29

14. *Where the court can not be satisfied as to the truth and materiality of a case*, an inspection is a course constantly taken by the court to do justice. *Id.*

15. *Time for appointing examiners—Construction of Pennsylvania Mine-safety statute. Com. v. Conyngham*, 8, 32

16. *Terms and intent of the Safety Act* stated and the statute construed so as to make it definitely operative from the time of its passage. *Id.*

17. *Order for inspection granted without notice. Thomas Co. v. Allentown Co.*, 8, 36

18. *Superintendent of mine refusing admission to stockholder.*—By certain acts of the legislature of Nevada to protect the rights of stockholders, it is made the duty of the superintendent of a mine to keep posted, in some conspicuous place, the day of the week on which authorized stockholders may be admitted; and a failure to comply with any of the conditions mentioned in the act, is declared to be a misdemeanor. *Held*, that the statute does not command the superintendent to admit stockholders, nor is he in terms forbidden to refuse admission, and such refusal can not, by implication, be construed into a violation of the statute. *Diedesheimer, ex parte*, 8, 41

19. *No order interlocutory to break soil. Ennor v. Barwell*, 12, 101

20. *Entry of surface owners allowed to build support. Dugdale v. Robertson*, 13, 662

INSTROKE.

1. *Mode of working mine.*—In the absence of express contract, the

INSTROKE. *Continued.*

- lessee of a mine is entitled to work the minerals by "instroke."
Whalley v. Ramage, 8, 53
 2. "Instroke" is a workmanlike manner of mining—Irremediable damage not presumed. *Lewis v. Fothergill*, 15, 271
 3. A lessee of coal mines may work by instroke when the lease does not covenant against it. *Id.*

INSTRUCTIONS.

1. *Instructions that mislead not given.*—The court will not give an instruction, though correct, if it will mislead the jury. *Boucher v. Mulverhill*, 12, 350
 2. *Point already covered.*—It is not error to refuse instructions prayed for where the same point has been already covered. *De Noon v. Morrison*, 16, 33
 See ERROR

INSURANCE.

1. *Policy avoided by riot.* *Lycoming Ins. Co. v. Schwenk*, 8, 53

INTEREST.

1. *Not allowed after laches.*—Each party used the ore without requiring the other to account, and there was no known excess to be paid for as the business progressed. Being a voluntary delay of both, interest was properly chargeable only from the time the balance was struck. *Grubb's App.*, 3, 416
 2. *Interest not covered by the lien given for wages if it accrued thereon before the lien attached.* *Delaware Co. v. Oxford Co.*, 9, 417
 3. *Usury.*—Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent interest, is usurious. *Fereday v. Wightwick*, 11, 247
 4. *A decree directing repayment of purchase money with interest, until paid, is proper in a case where the contract is canceled.* *Perkins v. Rice*, 13, 8
 5. *Interest is chargeable on ore taken in excess of the quantity limited by the reservation.* *Alden's App.*, 13, 140
 6. *Interest is to be paid upon rents found to be due from tenant in common in possession, to his co-tenants.* *Early v. Friend*, 14, 271
 7. *Interest will not be charged against an executor who pays over to those entitled thereto, within a reasonable time, the funds accruing in his hands.* *Lynn's App.*, 15, 126

IRRIGATION.

1. *Prior appropriation of water for irrigation.*—The right to mine under land occupied for agricultural purposes, does not give the right to take the water already appropriated by the surface occupant, by his irrigating ditch. *Rupley v. Welch*, 4, 245
 2. *Irrigator not allowed to waste water.* *Barnes v. Sabron*, 4, 674
 3. *Irrigation considered as a climatic necessity makes the right of ditch-transit, which is essential to its enjoyment, analogous to the case of a way of necessity.* *Yunker v. Nichols*, 8, 64
 4. *Irrigation recognized at common law.* *Weston v. Alden*, 8, 82
 5. *Instance of the common law rule applied to irrigation.* *Arnold v. Foot*, 8, 83

IRRIGATION. *Continued.*

6. *Apportionment of water by commissioners void.* (*Construction of special Statute of Montana.*) *Thorp v. Woolman*, 8, 87

7. *Right of appropriation limited by statute.*—The statute referred to recognizes the right of appropriation of water for irrigation, limiting it, however, to persons owning land upon the banks of the stream from which the same is taken, and also limiting the quantity he can appropriate to what is necessary to irrigate his land. *Id.*

8. *Reasonable use—How determined.* *Union M. Co. v. Ferris*, 8, 91

9. *Adverse use without actual damage.*—There may be an invasion of the right which will justify an action, although no actual damage is shown; as, if one should divert a portion of the water permanently from the stream, such a diversion, if continued the requisite length of time, would ripen into a title; but if the riparian proprietor only exercises his natural right in the use of the water without damage to the servient tenement, then the use is not adverse. *Union Co. v. Dangberg*, 8, 118

10. *Form of decree between mill-man and irrigator.* *Id.*

11. *Appropriation of water.*—Irrigating companies can not control running water except by legal appropriation thereof, and any person, a stranger to such company, has a right to appropriate water not legally appropriated by others. *Munroe v. Ivie*, 8, 127

12. *Territorial control of water, limited.*—In this country lands are open to all persons, as also the appropriation of running waters, and the Territorial Legislature has no power to enact laws that will permit an irrigating company to control or manage the water of any part of the Territory in disregard of the rights of individual claimants. *Id.*

13. *Parol division of water enforced.* *Coffman v. Robbins*, 8, 131
See APPROPRIATION, DITCH, RIPARIAN RIGHTS, WATER.

JOINDER.

1. *No joint action, no joint responsibility.*—If one's own acts and threats do not render him liable, similar independent ones of others will not. *Keyes v. Little York Co.*, 14, 96

2. *The cases governing the joinder of parties considered, and held,* that where an action for a tort is brought against several co-defendants, it is essential that the wrong complained of be joint. *Id.*

JOINT STOCK COMPANY.

1. *A joint stock company is a partnership*, the capital of which is divided, or agreed to be divided, into shares, so as to be transferable without express consent of all the copartners. *Hedges' App.*, 11, 468

2. *Joint stock association.*—The members of an unincorporated joint stock association engaged in boring for oil, sustained by money advanced by each, may, in a proceeding for the distribution of a common fund, be treated as partners. *Butterfield v. Beardsley*, 11, 495

JUDGMENT.

1. *Final judgment under code practice.*—The judgment of a Territorial Supreme Court affirming judgment below upon appeal from order

JUDGMENT. *Continued.*

denying a new trial, treated as a final judgment upon which writ of error could issue. *Sparrow v. Strong*, 2, 320

2. *Remedy for sale under judgment afterward reversed.* *Reynolds v. Hosmer*, 4, 658

3. *Assignee of erroneous judgment liable for sale made under it.* *Id.*

4. *Estoppel.*—The fact that such former owner has moved in the lower court to have the sale set aside, and his motion has been denied, will not estop him from afterward affirming the sale and maintaining his action for damages. *Id.*

5. *Judgment in trust for miners and small creditors*, is not forbidden by law, the debts being justly due and the object being to save costs. *Breading v. Boggs*, 11, 296

6. *Judgment on matters not in issue.*—In an action brought to obtain decree, restraining defendants from destroying plaintiffs' ditch over certain ground, which decree recited "that defendants have title and right of possession to the mining land in action, as defined in defendants' answer." *Held*, that the judgment being upon matters not in issue, was, upon this point, superfluous and nugatory. *Gregory v. Nelson*, 12, 124

7. *Idem*—Void for uncertainty. *Id.*

8. *Judgment must be a sequence to the pleadings.* *Id.*

JURISDICTION.

1. *Tort-feasor beyond jurisdiction not a necessary party in an injunction suit.* *Cole Co. v. Virginia Co.*, 7, 503

2. *Waiving place and mode of trial.*—A defendant who is entitled to a trial in a certain county, by a jury, waives these rights by submitting to a trial by the court in a different county. *West Point Co. v. Reymert*, 7, 528

3. *Interest goes to make up the amount in dispute*, and if it and principal swell the judgment to the sum at which the court take jurisdiction, it is the same as if it were the principal alone. *Skillman v. Lachman*, 11, 331

4. *Judicial notice of non-residence.*—A Michigan court may well take judicial notice that stockholders in the mining corporations of the State are largely non-residents, and beyond their jurisdiction for rendering personal judgments. *Milroy v. Spurr Mtn. Co.*, 12, 53

5. *Where there is no special plea to the jurisdiction*, it is error to submit a jurisdictional point to the jury in such a way that if they found against the jurisdictional fact the result would be a judgment, apparently in bar, when the plaintiff would be entitled to another trial in a court having jurisdiction. *Fairbanks v. Woodhouse*, 12, 86

6. *Questions upon United States statute* (jurisdiction of Circuit Courts) reserved. *Van Bokkelen v. Cook*, 13, 421

7. *Power of judge beyond his district.*—A district judge, who has, under order of the circuit judge, tried a case in another district, has jurisdiction to pass upon a motion for a new trial in the case, even after he has returned to his own district, where the parties waive his

JURISDICTION. *Continued.*

returning to the other district for the purpose of deciding the motion.

Cineesman v. Hart, 16, 264

8. *Extra-territorial jurisdiction* of the Superior Court of San Francisco over mining claims. *Watts v. White*, 13, 11

9. *Jurisdiction of inferior courts—Presumptions—Service.*—A judgment of a court of special and limited jurisdiction should not be admitted in evidence to show title to property obtained under it, until the facts necessary to confer jurisdiction are affirmatively shown; nothing is presumed in favor of the jurisdiction of inferior courts, and it is imperatively necessary that due and legal service of summons upon the defendants should be shown. *Mallett v. Uncle Sam Co.*, 1, 18

10. *County succeed Probate Courts.* *Keystone Co. v. Gallagher*, 9, 407

11. *The jurisdiction of the Circuit Court of the United States* is limited to certain persons and subjects; but within those limits it is complete and full, with all the powers of the English High Court of Chancery. *U. S. v. Parrott*, 7, 336

12. *Jurisdiction of U. S. courts over foreign corporations.*—A corporation organized in the State of California, but owning and working mines in Nevada, having agents who are served with process in Nevada, is a person found in the district within the meaning of the Judiciary Act of 1789. *Thornburgh v. Savage Co.*, 7, 667

13. *Idem—Service in such cases.* *Id.*

14. *Transfer of causes.*—Under the clause "arising under the constitution and laws of the United States," found in section 2, 18 Stat. 470, of the act to determine the jurisdiction of the United States courts, passed March 3, 1875, only such suits can be transferred from the State to the national courts as involve a disputed construction of the constitution and laws of the United States. *Trafton v. Nougues*, 8, 138

15. *Federal jurisdiction in mining suits.*—In an action for trespass upon a gold mining claim, and seeking an injunction, a petition was filed by the defendant for the removal of the cause to the United States Court, in which it was alleged that the defendant located and held his claim under the several acts of Congress relating to the subject, but it did not appear that any question was involved other than is usual in the trial of rights to mining claims, or which might not be determined by the local laws, rules and customs, without reference to the acts of Congress. *Held*, that the petition did not show such a state of facts as to warrant the transfer, and the case was, on motion, remanded. *Id.*

16. *Petition for transfer—What it should state.* *Id.*

17. *Petition alleging legal conclusion insufficient.* *Id.*

JUROR—JURY.

1. *Competency of juror.*—A juror in a civil action, who, on his *voir dire*, expresses an entire willingness, as well as ability, to accept the facts as they shall be developed by the evidence, and to render a verdict in accordance with them, can not be challenged for cause, for

JUROR—JURY. *Continued.*

the reason that he had previously conversed with another party in relation to the facts of the case, and had received from him an impression in relation to them. *Union Co. v. Rocky Mt. Bk.*, 1, 433

2. *Discretion of court in rejecting juror.*—The court may in its discretion, reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause. *Atlas Co. v. Johnston*, 1, 388; *Grady v. Early*, 12, 104

3. *Challenge to juror because of opinion as to course of veins, held, properly disallowed.* *Weill v. Lucerne Co.*, 3, 373

4. *Treating jury to liquor during inspection of mine.* *Schissler v. Chesshire*, 5, 309

5. *Stockholder at date of suit disqualified as juror.* *Fleeson v. Savage Co.*, 8, 153

6. *Error in overruling challenge for cause, cured by peremptory challenge.* *Id.*

7. *The fact that a peremptory challenge is used to set aside a juror who should have been set aside for cause, will not authorize a reversal, unless it is made to appear that the peremptory challenge was needed to excuse an objectionable jurymen.* *Id.*

8. *The court will not presume without an affirmative record that a party exhausted his challenges.* *Id.*

9. *Imperfect record—Presumption as to disqualified juror.*—In a case in which G., a disqualified juror, was challenged for cause, and the challenge overruled, if the record does not show whether he served as a juror or not, and there is no assignment of error on the ground that he did so serve, but only that appellant was compelled to challenge him peremptorily, it will be assumed by the Supreme Court that he was peremptorily challenged. *Id.*

10. *Trial by jury in common law causes is a constitutional right, and a law that they shall be tried "agreeably to the course of a court of chancery" is obnoxious and void.* *North Penna. Co. v. Snowden*, 14, 294

JUSTICE OF THE PEACE.

1. *Justices' courts are not courts of record, do not proceed according to the course at common law, and are to be confined strictly to the authority given by statute without implications indulged in their favor.* *Cox v. Groshong*, 6, 210

2. *Justice his own clerk.*—Act 118 of 1877, section 35, provides that in actions on labor debts, the clerk of the court shall indorse directions on the execution. *Held*, to refer to the officer issuing execution, and not to exclude the justices' courts, in which the justice is his own clerk, from jurisdiction of such actions. *Milroy v. Spurr Mtn. Co.*, 12, 53

3. *Justice's jurisdiction in an action to enforce personal liability.* *Id.*

4. *Diversion of water.*—A justice has no jurisdiction over a case alleging injuries by diversion of water. *Hill v. Newman*, 4, 513

KNOWN LODE.

1. *Question of "known lode" left to the jury under proper instructions.*—Their finding is conclusive. *Dahl v. Raunheim*, 16, 214

KNOWN LODE. *Continued.*

2. *The discovery of a lode 200 or 300 feet outside the placer boundaries creates no presumption of the existence of any lode within such placer claim. Id.*

3. *Land office can not pass on known lode.*—The action of the land office in issuing a lode patent over the ground of an already patented placer does not bind the placer patentee to concede such lode to have been one of those excepted by the general terms of his placer patent. *Iron Co. v. Campbell*, 16, 218
See PLACERS.

LACHES.

1. *Rescission—Fluctuations in oil.*—Parties can not take the chance of a rise in the price, and elect to deliver or not to deliver, according to the market; a month's delay in such case upon a series of contracts for monthly deliveries of oil is an unreasonable time. *Morgan v. McKee*, 3, 128; same ruling as to stock contract. *Leaming v. Wise*, 7, 41; and as to oil well sale. *Twin Lick Co. v. Marbury*, 3, 688

2. *Landlord's wrong condoned by tenant's laches.*—Another having intruded into the possession, the lessee did not bring suit for two years and a half: *Held*, that this was an abandonment of the term, and obviated the necessity for a demand of rent, and a formal declaration of forfeiture. *Kreutz v. McKnight*, 6, 814

3. *Length of time, short of the statute of limitations*, is sometimes a bar, but not if fraud exists, or if the delay is accounted for. *Warner v. Daniels*, 6, 496

4. *Standing by.*—It was in proof that defendants knew of the direction and extent of plaintiff's work, which they allowed to be continued without objection; even if this fact were only doubtful it would be sufficient to defeat an injunction, for they should have been on their guard to prevent the expenditure of money on what they meant should not be realized upon by the parties expending it. *Mammoth Co's App.*, 7, 460

5. *The delay of two years in bringing suit for injunction to restrain the working of a mine*, is a fact seriously affecting the claim for an injunction. *Lyon v. Woodman*, 7, 494; *Birmingham Co. v. Lloyd*, 3, 166

6. *Laches in obtaining possession.*—If a party undertakes to subject to his dominion any portion of the public domain, the law will protect him in his possession, if he pursues the work of inclosing the tract with reasonable diligence; but in this case the plaintiff, having failed to show any effort on his part to subject the land to his control for a period of two years, was *held* to have shown an inexcusable want of diligence. *Rivers v. Burbank*, 7, 584

7. *Special risk—Special vigilance.*—Mineral property, of all properties perhaps the most, requires the parties interested in it to be vigilant and active in asserting their rights. *Prendergast v. Turton*, 3, 167

8. *Laches of partners excluded from the renewed lease.* *Clegg v. Edmondson*, 3, 180

9. *Special risk of mines.*—The rules as to laches and acquiescence governing cases of direct trust and applying to property of an ordinary character, do not apply to constructive trusts affecting property like

LACHES. *Continued.*

mines, subject to extraordinary contingencies and requiring large expenditures without any certainty of returns. *Id.*

10. *The continual assertion of a claim without any act done to give it effect, will not alone keep alive a right. Id.*

11. *Delay prevents specific performance. Sharp v. Wright, 8, 202*

12. *Laches applied to sale of mine.*—The defense of laches applies with peculiar force to a bill seeking to set aside a sale or lease of mineral property. *Ernest v. Vivian, 8, 205*

13. *Bill to set aside lease and for an accounting—Laches defeats attempt to avoid the lease.* [Syllabus states facts at length.] *Id.*

14. *Irregular foreclosure cured by delay of debtor. Rigney v. Small, 8, 217*

15. *Increased value.*—A party can not lie by and await the increase in value of property by mining, and then assert his rights as against a sale merely voidable. *Id.*

16. *Ultra vires affected by laches.*—Even if expenditures were *ultra vires*, stockholders knowing of them and not objecting until long after their completion, could not compel the directors to account for the moneys expended. *Watts' Appeal, 8, 223*

17. *Assent of stockholder presumed.*—When an act of directors is in excess of their authority, but done with a *bona fide* intent of benefiting the corporation, and a shareholder knowing of it does not dissent within a reasonable time, his assent will be presumed and he can not gainsay it. *Id.*

18. *Protest not enough, without suit. Id.*

19. *Laches operates as a bar.*—It is against good conscience that one having power to prevent should stand by and see his associates spend money which may result to his benefit, and afterward charge them with it. His neglect to act at the proper time effectually bars his right. *Watts' App. 8, 223; Harlow v. Lake Superior Co., 8, 235*

20. *Laches, within limitation period.*—As a general rule, a constructive trust as to personal rights may be asserted at any time within six years after the knowledge of the facts creating it; but *laches*, for a shorter period, aided by other circumstances, will bar the right. *Evans' Appeal, 8, 255*

21. *Relief sought through corporate equities.*—Where the bill is brought by stockholders, praying the payment of money, not to themselves but to the corporation, and seeking relief through the equitable rights of the corporation, the knowledge and conduct of the corporation become essential to be considered; and the facts on which relief is asked appearing on the minutes of the corporation, a delay of nearly six years amounts to an acquiescence. *Id.*

22. *Rights intervening, pending the delay.*—Allowing money to be borrowed and judgments against the company to be obtained and their property sold, the facts for relief being meanwhile patent to the plaintiffs: *Held*, such intervening circumstances as made the delay unreasonable and fatal to the bill. *Id.*

23. *Laches will bar a plaintiff against acts originally voidable. Id.*

24. *Subsequent plaintiffs.*—The *laches* of parties made plaintiffs by

LACHES. Continued.

amendment after the suit was commenced, considered as running up to the time of their seeking to become parties. *Id.*

25. *Laches may confirm irregular forfeiture of shares. Rule v. Jewell*, 8, 291; *Prendergast v. Turton*, 8, 167

26. *There is no equity in the conduct of a licensee who experiments, quits, and begins not again until another has succeeded. East Jersey Co. v. Wright*, 9, 332

27. *Rescission—Waiver.*—Where a party desires to rescind upon the ground of mistake and fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract. *Grymes v. Sanders*, 10, 445

28. *Statu quo—Successful adventure—Refusal to accept risk.*—The grantor in a deed who has sold on account of his unwillingness to pay assessments or take the risk of developing the mining ground conveyed, which mining ground, upon the expenditure of the grantee, is afterward developed into a mine of enormous value by the discovery of a bonanza, can not be heard afterward to allege in equity as late as two years after his transfer, a mistake in the deed as to the number of feet granted. And although his grantees have made immense sums out of the proceeds of the mine, it is not a case where the parties can be placed in *statu quo*, within the proper meaning of the term. *Kinney v. Cons, Va. Co.*, 10, 458

29. *Laches affecting equities between copartners.*—One of a firm of oil refiners purchased in his own name a lot on which to erect a refinery; the firm took a lease of it from him, and erected buildings on it. Held, that after accepting such lease, erecting the buildings, and delaying for years to assert title until the relations of the parties became altered and complicated, it was too late for the firm to claim relief in equity by bill calling for a conveyance. *Slemmer's App.*, 11, 488

30. *The maxim "vigilantibus non dormientibus leges subveniunt"* applies in equity as well as law. *Id.*

31. *Excusable delay distinguished from laches. Stockbridge Co. v. Hudson Co.*, 13, 121

32. *Laches by co-tenant in objecting to sale.*—A and B being tenants in common, A, without any authority from B, contracted for the sale of the estate. B, on being informed of it, objected, and said the price was too low; but a mortgagee threatening to sell the estate under his power unless this sale proceeded, B allowed the matter to go on, and gave no notice to the purchaser that he dissented; an abstract was delivered and negotiations as to the title went on for about three years. *Semble*, that it was too late for B to object that the agreement was entered into without his authority. *Phillips v. Homfray*, 14, 678

33. *Account against life tenant.*—After long delay in taking proceedings against tenant for life committing waste, the court en-

LACHES. *Continued.*

deavors to deal liberally with him, and will charge interest from as late a period as the circumstances can suggest. *Bagot v. Bagot*,

15, 130

84. *Silence for more than eight years* after a party has abandoned a contract for patent of mineral land, and has submitted to a decision of the question by the land department, however erroneous, is such *laches* as amounts to acquiescence in the proceedings and precludes a court of equity from interfering to annul them. *U. S. v. Marshall Co.*,

16, 205

85. *Where diversion of water from plaintiff's claim is sought to be enjoined*, it is no objection to relief that the building of the flume, by means of which the water was diverted, was begun more than five years before suit, where the particular diversion complained of occurred within a few months of the action. *Fuller v. Swan River Co.*,

16, 253

LAND.

1. *The word soil means surface.* *Pretty v. Solly*, 3, 301

2. *Real estate, what constitutes.*—Coal and other mineral in a mine and under the soil are real estate, so to be treated in conveyance and holdings. *Manning v. Frazier*,

3, 307

3. *Devise of quarry and its rents.*—The owner in fee of land containing a stone quarry, having mortgaged and leased the quarry, devised it to his son with directions "that the rents arising from the quarry be applied to discharge the incumbrances on the same:" *Held*, that the rents due at the date of testator's decease passed to the son as parcel of the devise for the purpose directed, and not to the executors. *Emery v. Owings*,

3, 378

4. *Debt and rent out of same subject-matter.*—The direction to apply the rents to debts arising out of the subject-matter of the devise compels such construction; if the direction had been to pay debts generally it would be otherwise. *Id.*

5. *Land includes not only the ground or soil, but everything attached to it, above or below.* *Stratton v. Lyons*,

10, 314

6. *A vein of coal is land, unless distinguished from the land by the deed of conveyance.* *Wilkinson v. Proud*,

12, 269

7. *A legacy charged on land is an interest in land within the Statute of Mortmain, and can not, while it remains unpaid, be bequeathed for charitable uses by the legatee.* *Brook v. Bradley*,

12, 649

LAND OFFICE.

1. *Implications based on land office action.*—The decision of the register and receiver of the United States land office in favor of an applicant for pre-emption, is evidence not only that such person is entitled to a patent, but that he has settled upon and improved the land, and is an acknowledgment that his settlement and possession are lawful, and in accordance with the will of the government. *Courcaine v. Bullion Co.*,

12, 236

2. *Land office adjudications.*—Although the decision of the register and receiver is not a judicial decision, and although liable to reversal

LAND OFFICE. *Continued.*

by the commissioner of the general land office, it is evidence of the facts upon which it is supposed to be based, until actually reversed. *Id.*

8. *Priority of applicants—Diligence no fraud.*—One who makes the first application for vacant land, and obtains a warrant, is to be preferred over another who makes a second application though he knew of the second applicant's intent. *Shoenberger v. Baker*, 14, 412

4. *The finding of the land department as to a question of fact*, or a mixed question of law and facts, on a question properly before it, is conclusive on the courts; *Jeffords v. Hine*, 15, 575; and is not subject to collateral attack. *Aurora Hill Co. v. '85 Co.*, 15, 581

5. *Acts of de facto officer are valid*, whether he has the legal right to hold the office or not. *Jeffords v. Hine*, 15, 575

6. *Idem.*—A receiver of the land department, acting also as register, by authority of an order from the land department, is a *de facto* officer, though it be unlawful for him to hold the office. *Id.*

7. *Errors in land office.*—Errors and irregularities in the process of entering and procuring title should be corrected in the land department, so long as there are means of revising the proceedings and correcting the errors. *U. S. v. Marshall Co.*, 16, 205

LATERAL SUPPORT.

1. *Damages for removal of.*—The actual loss of and injury to the soil are the measure; and it is immaterial that the defendant is not the owner of the land dug upon. *Gilmore v. Driscoll*, 14, 87

See SURFACE SUPPORT.

LEASE.

A.—IN GENERAL.

B.—THE TERM, THE THING DEMISED.

C.—LICENSE—PAROL LEASE.

D.—THE COVENANTS.

E.—RENTS AND ROYALTIES.

F.—ASSIGNMENT.

G.—FORFEITURE—ABANDONMENT—EVICTION.

H.—FIXTURES.

A. In General.

1. *Intent, not form, determines instrument a lease.* *Watson v. O'Hern*, 8, 888

2. *Practice as to settling terms of lease.*—On reference to chambers, to settle the terms of a lease, the court will, when convenient, make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings. *Strelley v. Pearson*, 7, 618

8. *Open and unopened mines.*—Under lease of lands not mentioning mines the lessee may work only those open. *Astry v. Ballard*, 8, 816

4. *Contract construed as a present lease with fixed covenants, and not as an executory arrangement with stipulations.* *Kemble Coal Co. v. Scott*, 9, 80

LEASE—In General. *Continued.*

5. *Lessee taking risk of title.*—In the negotiation immediately preceding the agreement, the vice-president of the company, who conducted the negotiation, had written to plaintiffs that if the lease could be effected defendants would take the risk of plaintiffs establishing their title to one of the tracts. *Held*, that it was proper to leave to the jury, and for them to find, "that the defendants took the tract with knowledge of the title and at their own risk." *Id.*

6. *Instrument construed as a coal lease.*—An instrument which purports to lease and convey all the coal in certain land for the term of twenty years, is not an absolute grant of all the coal under the land, but is a lease of all the coal which the second party can mine during the term limited. *Austin v. Huntsville M. Co.*, 9, 115

7. *The bare execution and delivery of a coal lease without entry or taking possession of the land or coal, does not vest any property in the coal in the lessee.* *Id.*

8. *Private custom of lessor.*—A lessee is not bound by the private custom of his lessor in regard to his mines or lands, not shown to have been known to him when he entered upon them. *Beatty v. Gregory*, 9, 234

9. *Construction of lease for joint farming and mining.*—Where an agreement in its recitals stated that, whereas, etc., the parties of the first part are desirous to lease and convey the right of mining, and in the granting clause the demise was of the said "farming lands," "together with the right to mine," and "together with the enjoyment of so much of the surface of said lands," as might be necessary to carry on the mining, *it was held*, that the right to the farming land was as definite as the right to mine. *Walker v. Tucker*, 8, 673

10. *Perils of the adventurer.*—The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all the risk of its failure both as to quantity and value, unless either is warranted. *Gowan v. Christie*, 8, 688

10½. *Dissimilarity of mining and farming leases.*—A mining lease is practically a sale of a portion of the land: *dicta*, therefore, applicable to agricultural leases, are not always applicable to leases of minerals. *Id.*,

11. *The special lease in question in this cause construed to be, not a lease of the lands with the privilege of mining, or a lease of the lands together with the minerals, but a grant of a specific mining privilege, particularly set forth in the lease, excluding all other uses except as incident to the mining rights granted.* *Harlow v. Lake Superior Co.*, 9, 47

12. *The reservation of the agricultural use to the lessor of all premises not needed for mining purposes, is inconsistent with an intent to grant an ordinary leasehold interest.* *Id.*

13. *Lease of tortuous vein construed as to description.* *Sobey v. Thomas*, 4, 359

14. *Construction of oil lease drawn before oil wells were known.* *French v. Breuer*, 11, 108

15. *Rights of lessee of one co-tenant.*—A party who has mined ore

LEASE—In General. *Continued.*

as tenant of one of several co-owners, may recover in trespass against another of the co-owners for taking away the ore so mined by such tenant; otherwise, if he fail to prove the alleged lease or license under which he mined the ore. *Blewett v. Coleman*, 11, 160

16. *New partners in oil lease—Quantum meruit.*—Held, that the partners who came into the concern after the contract had been made were not liable upon the contract, and that the mode in which interests in oil leases were sold, divided and subdivided, while work was going on, could not alter the rule; but that the new partners would be liable upon a *quantum meruit* for work done after they came into the firm. *Babcock v. Stewart*, 11, 447

17. *Lease not affected by prior agreement of sale.* *Turner v. Reynolds*, 12, 190

18. *Agreement for lease construed as a lease.* Held, to pass a corporeal interest. *Chicago Co. v. U. S. Co.*, 12, 570

19. *Wife refusing signature to lease,* made in her name and her husband's, renders it null and inoperative though signed by husband and lessee. Held, that the husband had a right to destroy it. *Tatham v. Lewis*, 6, 671

20. *Accepting lease equivalent to execution.*—By accepting the lease P. became bound to sink the well, though he had not signed the lease, and his omission to execute it under seal was of no importance. *Chamberlain v. Parker*, 10, 145

21. *Lease is perpetual by implication*—not placing a limit on the term if lessee performs his obligations. *Id.*

22. *Contract construed as a lease.*—A grant of lands to mine for coal "so long as there is coal to mine thereon" with leave to take, under certain conditions, all the coal in the lands, and also containing mutual covenants, and provision of forfeiture in case of non-compliance, construed to be a lease. *Gartside v. Outley*, 10, 566

23. *Oil leasehold interests and buildings on leaseholds are not goods and effects* within the meaning of the act relating to foreign attachments; therefore, when the sheriff in service treated such property as personalty, such service was not a compliance with the act. *Vandergrift's Appeal*, 9, 397

24. *A lease, a chattel real—Execution.*—A leasehold being a chattel real, by reason of its fixed and permanent character, can under an execution, be seized and held only as real estate—not as personal goods susceptible of transportation. *Titusville Works' Appeal*, 9, 17

25. *Levy—Sheriff's responsibility.*—No seizure on view is required; the levy is by description. It can not be taken into custody, and the sheriff is no more responsible for it than he is for real estate. *Id.*

26. *Reservation during outstanding lease.*—The owner of land having leased a marble quarry thereon for ten years, afterward conveyed the land to a third party, "reserving the use of the quarry until the expiration of the lease." The lease was canceled within the ten years by the parties to it. Held, that the reservation was not thereby extinguished, but that it would remain in force till the end of the ten years. *Farnum v. Platt*, 8, 380

LEASE—In General. *Continued.*

27. *Lessee not taking benefit of mistake.*—Equity will not reform on account of a mistake where a lessee is not seeking to take advantage of the mistake and has not, on request, refused to allow it to be corrected. *Brainerd v. Arnold*, 8, 478

28. *It is no reform of a lease to insert useless covenants.* *Id.*

29. *Interest of lessee defined.*—A lease of the right to mine coal is the grant of an interest in the land and not a mere license to take the coal. *Harlan v. Lehigh Coal Co.*, 8, 496

30. *"Recently worked."*—Can not be understood as meaning that the quarry was opened four years previously. *Owings v. Emery*, 8, 387

31. *Construction of successive leases* of underlying coal veins, holding that there was a partial merger. Allowance for expense incurred in "faults." *Lehigh Co. v. Harland*, 8, 423

32. *Lease, good without record.*—A lease is valid without record, between the parties and all others not entitled to the notice, which is the object of the recording acts. *Barnum v. Landon*, 14, 250

33. *Lease as to surface—Contract as to mines.*—An agreement compelling a party to raise a certain amount of ore annually, and concerning the use of farming land, construed as a lease of the surface but not of the mine. *Shaw v. Wallace*, 14, 420

34. *Expressio unius.*—Provisions in a coal lease for protection of certain portions of the surface used *arguendo* as authorizing the destruction of parts of the surface not specially mentioned in such connection. *Shafto v. Johnson* 15, 262

B. The Term—The Thing Demised.

35. *Tenancy at will.*—The rule that tenant at will is entitled to notice, does not apply when the entry is unauthorized. *Yellow Jacket Co. v. Stephenson*, 3, 545

36. *Lessee may not open new mine*, though he may work those already opened if not specially prohibited. *Harlow v. Lake Superior Iron Co.*, 9, 47; *Owings v. Emery*, 8, 387

37. *Narrow construction not favored.*—In construing a lease it is contrary to well settled rules to give it a narrow and technical interpretation based upon some particular word or clause; the intent must be gathered from an examination of the instrument as a whole, and all clauses made consistent if possible. *Harlow v. L. S. Co.*, 9, 47

38. *Additional openings.*—A lease which gives the right to take out all the coal beneath a certain surface confers also the right to make all necessary openings to reach the coal; the lessee is not restricted to a single opening. *Trout v. McDonald*, 9, 33

39. *When the lessee may or may not work mines.*—A lease of lands without mentioning mines, will entitle the lessee to work open, but not unopened mines. If there be open mines, a lease of land with the mines therein will not extend to unopened mines; but if there be no open mines, a lease of land, together with all mines therein, will enable lessee to open new mines. *Clegg v. Rowland*, 8, 530

40. *Application of the rule.*—Where there was a conveyance to trustees of land, together with the mine hereunder, and a power to

LEASE—The Term—The Thing Demised. *Continued.*

grant leases, without mentioning mines or mining leases: *Held*, that the trustees had no power to grant leases of unopened mines. *Id.*

41. *Property in oil found by lessee of salt well.* *Held*, that the oil was the property of the lessees. *Kier v. Peterson*, 8, 499

42. *Mining lease construed to include all purposes.*—The demise of land within defined boundaries in the ordinary form, followed in the *habendum* with "together with the quarry," etc., and the privilege of a wharf for use in hewing stones thereon, the rental being a royalty on the stone quarried. *Held*, a general demise without restriction of use, although the main object may have been to allow of quarrying. *Burr v. Spencer*, 8, 450

43. *A deed granting the right to prospect and mine at a rent payable quarterly and running "so long as the party or successors may deem it proper to operate."* *Held*, a lease from year to year requiring a six months' notice to quit before the lessors could terminate it. *Patton v. Axley*, 8, 472

44. *Mutual mistake—Contract to sink for oil where none exists.* *Bell v. Truit*, 8, 649

45. *Failure of minerals demised.*—Where the thing let turns out to be a nonentity, the lessee is not bound. In such a case it is perfectly reasonable that the lease should be subject to reduction. Where there is a total destruction or exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it. *Gowan v. Christie*, 8, 668

46. *Indivisible privilege—New mines.*—The right leased, being that of an undivided half, gave the lessee the right to prospect over the entire lands, and open and work as many mines as he deemed proper; this entire right he could assign or convey, but he could not carve it up and parcel it out into several distinct rights, to be held and operated by more than one person, company or corporation; his right, being a single one, could not be subdivided, and a similar undivided right remain vested in the lessor. *Harlow v. Lake Superior Co.*, 9, 47

47. *In what case duty of lessor to fix boundary.*—Where a party is the lessor of two adjoining mines, the rule, governing adjacent mines when held by different owners (that the lessee must ascertain the dividing line at his peril) does not apply. The lessor, having the power to protect himself by covenant, if he neglects to do so, can not plead rules resulting *ex necessitate rei* as against his own grant. *Freck v. Locust Mountain Co.*, 9, 57

48. *Measure of damages—Coal severed belongs to the tenant.* *Lykens Coal Co. v. Dock*, 8, 571

49. *Construction of quarry lease, where there was a prior outstanding surface lease.* *Owings v. Emery*, 8, 387

50. *Rubble stone not included in lease of the granite.* *Emery v. Owings*, 8, 378

51. *Quantity of land embraced in leased tract—Question for jury.*—Where there was a conflict of testimony, the question of fact as to quantity of land in a certain tract embraced in a lease, should have been left to the jury, and it was error in the court to assume that a certain number of acres were contained therein. *Kille v. Ege*, 12, 654

LEASE—The Term—The Thing Demised. Continued.

52. *The proper words to be used in creating a limitation upon the term granted by a lease, are "while," "as long as," "until" and "during."* *Vanatta v. Brewer*, 6, 358
53. *Destruction of lease.*—The destruction of a lease once delivered, does not destroy the estate or term. *Tatham v. Lewis*, 6, 671
54. *Two leases properly treated as one.*—The first of coal mines, the second, contingent, of miner's houses on the same premises. *Spencer v. Kunkle*, 2, 18
55. *A grant for a term of years of the exclusive right to take phosphate, is a demise of the phosphate beds contained in the land.* *Massot v. Moses*, 8, 607
56. *Lessor excluded from mining.*—A mining lease for a term certain, saving only to the lessor the right of tillage, is exclusive, and the lessor can not mine himself within the tenement. *Barker v. Dale*, 8, 597

C. License—Parol Lease.

57. *Lease distinguished from license.* *Offerman v. Starr*, 10, 614
58. *Lease distinguished from license—Divisibility of leasehold interest.* *Massot v. Moses*, 8, 607
59. *Controlling clause.*—The expression "that may be found by any person or persons, or contained in any part" of the land, distinguishes this from Lord Mountjoy's case, and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed, and intended as compensation for the right granted. *Id.*
60. *Cases cited.*—The principal cases on the distinction between grants, leases and licenses to mine, reviewed, and the principles deducible from them stated. *Id.*
61. *Oral agreement construed as lease, not license, and lessees allowed to sue trespassing third parties.* *Ganter v. Atkinson*, 9, 13
62. *Parol lease—Statute of Frauds.*—Whether a parol lease, without expressed limit of time, if established by clear and unequivocal proof, would be valid under the Statute of Frauds, as a lease for one year, and whether it would be renewed from time to time by payment of rent, not considered; but it seems that chapter 260 of 1860, amended by chapter 117 of 1872, does not affect the case. *Clegg v. Jones*, 7, 573
63. *Construction of written, followed by parol lease, holding the latter to be within the Statute of Frauds.* *Crawford v. Wick*, 8, 541

D. The Covenants.

64. *Lease of mine implies covenant to work with reasonable diligence.* *Koch's Appeal*, 4, 151
65. *Implied covenant for quiet possession—Rent not suspended by eviction.* *Tiley v. Moyers*, 4, 320
66. *Lease implies covenant for quiet enjoyment, but not against tort-feasors.* *Schuylkill Co. v. Schmoele*, 7, 480

LEASE—The Covenants. *Continued.*

67. *Idem*—An action of ejectment followed by a writ of estrepement is no breach of the covenant; and this result is not produced until it reaches actual or virtual eviction. *Id.*

68. *Continuous working.*—That under the terms of the lease the lessees were not liable in damages for not working the coal continuously. *Jegon v. Vivian*, 8, 628

69. *Barriers.*—That lessees were not bound to keep up a barrier so as to prevent air and water from flowing through the lessor's mine, and were not liable to pay for way-leave or air-leave. *Id.*

70. *Special damages—Way-leave defined.*—That the lessees were liable for any damage done beyond the removal of coal, by working the mine since the determination of the twenty-one years' lease, and must also pay for way-leave; that is, for the passage of coal through the lessor's mine since the determination of that lease. *Id.*

71. *A covenant to work to the fullest extent, etc.,* construed not to bind lessee to work to a loss. *Newton v. Nock*, 7, 611

72. *Usual covenants.*—Independent of special custom, a clause in a lease allowing the lessee to determine the lease when the mines demised are incapable of being worked to a profit, is not a clause usually inserted. *Strelley v. Pearson*, 7, 618

73. *No implied covenant of existence of veins*, though the lease defined two. *Harlan v. Lehigh Co.*, 8, 496

74. *Remedy at law for failure to work mines.*—Where lessees, or parties holding mines under implied covenant to work, have neglected and refused to work the mines with reasonable diligence, it is very clear that the owners have a complete and adequate remedy at law for the recovery of such damages as they may have sustained. *Koch's Appeal*, 4, 151

75. *"Fairly workable."*—Held, that under the words "fairly workable" a tenant was not bound to work at a dead loss. *Jones v. Shears*, 8, 333

76. *Lessee of exhausted colliery relieved in equity.* *Smith v. Morris*, 8, 317

77. *Unconscionable covenants not aided in equity.* *Talbot v. Ford*, 8, 347

78. *Covenant as to mixing ores.*—A lessee of iron works and mines covenanted to work the furnaces effectually, unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture, or process, make good, common pig iron. Held, that the mixture intended, was not necessarily of ore procurable on the demised premises. *Foley v. Addenbrooke*, 8, 349

79. *Verbal modification of covenant.*—A verbal assent by the lessor's agent to the doing of work contracted for by writing, under seal, if effectual, operates, not to make a new covenant, but to make the lessor liable in assumpsit upon the parol waiver, and the lessor can not be held in covenant in an action based on such waiver; otherwise, if it had been a suit by the lessor, where the lessee had waived a condition precedent. *Lehigh Co. v. Harlan*, 8, 423

LEASE—The Covenants. *Continued.*

80. *Idem.*—Where a plaintiff sues on a covenant which has been modified by parol in a point essential to the defendant's liability, the written contract will be treated as abandoned, or used only to mark the terms and extent of the new stipulations. *Lehigh Co. v. Harlan*,
8, 424

81. *Covenants to be construed together, and sweeping clauses controlled by the special.* *Rolleston v. New*,
8, 464

82. *A covenant to do nothing* that would cause flooding of the mine, which the removal of its machinery would occasion, is not broken by the lessee removing such machinery, under a clause allowing such removal. The lessor must protect himself by exercising his option of purchase. *Id.*

83. *Construction of covenant for lessees' quiet enjoyment.*—*The lessor working mine above, to the destruction of the demised mine.* *Shaw v. Stenton*,
8, 488

84. *Lessee working one mine in disregard of another*, let by the same lessors. *Powell v. Burroughs*,
8, 531

85. *Increased value of coal left.*—That the coal which the lessee failed to take out, according to his covenant, was of greater value to the lessor at the end of the lease than if it had been taken out, is not a ground for reducing the claim for the breach to nominal damages. *Id.*

86. *"Work free of expense."*—The power to "work free of expense" entitles the party to work in any manner he thinks proper, by himself, his servants, agents or assignees. *McBee v. Loftis*,
8, 222

87. *Implied covenant to work—Repeated actions for repeated breaches.* *Watson v. O'Hern*,
8, 334

88. *Lessor not bound to repair.*—A lessor is under no general obligation to put premises in repair, and his covenants to do so are not to be enlarged beyond their fair intent. *Clark v. Babcock*,
8, 599

89. *No covenant for capacity.*—In the absence of any distinct agreement, the lessee takes it as he finds it. *Id.*

90. *By the demise of farming lands*, a covenant is raised that they shall be used as such, and other covenants are implied as to waste and good husbandry. *Walker v. Tucker*,
8, 673

91. *Parol evidence to qualify working covenant.*—In covenant upon a lease under seal, it was inadmissible to prove that when the lease was preparing, the quantity of coal to be mined under the lease, was omitted at the request of the defendant, and that "he then undertook and promised to mine as much as he could dispose of." *Lyon v. Miller*,
10, 85

92. *Covenant construed to imply perpetual renewal.* *Copper M. Co. v. Beach*,
8, 336

93. *Form of recital in renewal lease.*—A testator covenanted for a perpetual renewal of a lease. *Held*, that the proper form of lease to be granted in renewal, was a demise for the new term, reciting the original covenant. *Id.*

94. *Construction of covenants for surface support.* *Hodgson v. Moulson*, 8, 511; *Wilms v. Jess*,
14, 56

LEASE—The Covenants. *Continued.*

95. *Upon the facts of the case, the lease being of a colliery: Held, that working by instroke was working in a proper and workmanlike manner. Jegon v. Vivian,* 8, 628

96. *Working from the deep.*—That lessees were not bound to sink a separate pit (shaft) for the demised coal. *Id.*

E. Rents and Royalties.

97. *Lessee for royalty, bound to work. Brainerd v. Arnold,* 8, 478;
Sharp v. Wright, 8, 202

98. *Payment of rent.*—A lease required that the lessee should make sworn monthly returns of coal mined, and pay the rent monthly. There was no evidence of such returns, and evidence of only three payments of rent. *Held,* that the law concluded that no returns were made, and that other rent was not paid. *McKnight v. Kreutz,* 6, 805

99. *Lease of coal bank equivalent to sale of coal. Tiley v. Moyers,* 4, 820

100. *Receipt of rent ratifies lease.*—The receipt of rent by a mining company without objection is a ratification of a lease made on their behalf by a subordinate without authority to make such lease. *Chamberlain v. Collinson,* 9, 36; *Blewett v. Coleman,* 11, 160

101. *Void lease validated by receipt of rent.*—The reception of rent for a great length of time may confirm a lease which may have been void in its inception. *Griffin v. Fellows,* 8, 657

102. *Secret holder of deed confirming lease by receiving rent. Trout v. McDonald,* 9, 32

103. *Acceptance of rent creates tenancy. Gartside v. Outley,* 10, 566

104. *Rental enforced against lessee of unworkable mine. Phillips v. Jones,* 8, 344

105. *Mine exhausted under covenant to raise fixed annual amount, and tenant held to pay the minimum rent. Marquis of Bute v. Thompson,* 8, 371; *Ridgway v. Sneyd,* 8, 414

106. *Mine exhausted before lease.*—If all the coal had been gotten by ancient workings, that might be a case for equitable relief. *Ridgway v. Sneyd,* 8, 414

107. *Construction of coal lease as to minimum rent, royalties and penalties. Watson Coal Company v. Casteel,* 9, 180

108. *Construction of coal lease as to minimum rent and instroke—Specific performance of working covenants refused. Wheatley v. Westminster Coal Company,* 8, 558

109. *Engine working two mines—Apportionment of rent between them—Coal consumed by the colliery engines. Senhouse v. Harris,* 8, 507

110. *Customary royalties.*—It is a custom in the Jo Davie's lead mining district for miners, mining on land without any agreement, to pay a royalty of one-sixth of the mineral raised. *Alderson v. Ennor,* 8, 526

111. *Facts of the case.*—Plaintiff and defendant owned adjoining mineral lands. A. went upon the land of defendant, sank a shaft and

LEASE—Rents and Royalties. Continued.

drifted into the ground of plaintiff and sold the mineral raised from plaintiff's land to the defendant, without retaining any royalty for the plaintiff. The mining was by permission of both owners. It was a proved custom in that locality for the ore buyer, at least if a smelter, to retain the royalty due the owner of the land. *Held*, that even if defendant were not a smelter, there was such privity between the parties as would create a liability, and that A. should be treated as the agent of the plaintiff in the sale of the mineral to the defendant. *Id.*

112. *Lease entered into after "drilling"—Unexpected encounter with "horsebacks"—Minimum rent.*—The lease had provided a minimum rent with a clause conceding release from payments in case no coal were found, in which contingency lessee could abandon. "Horsebacks" were found and the drilling experiments proved misleading. *Held*, that the developments stated were no ground for relief, and that defendants must pay the minimum rent and could not set up abandonment so long as they continued in possession. *McDowell v. Hendrix*,
9, 96

113. *Account for tonnage rent previously settled on erroneous statements.*—The declaration alleged that plaintiff let mines to defendant at an annual rent and a tonnage rent, the terms being so arranged that the tonnage was to make the mine pay, one year with another, £400 per annum; and as breach of covenant, the failure to pay. The plea alleged an annual accounting, and acceptance by payment of the amount agreed upon. The reply averred the omission of items of ore by mistake and plaintiff's ignorance of the facts. *Held*, that a plea showing only statement of accounts on one side did not show an accounting binding on plaintiff; and in any event the reply was sufficient to avoid the plea, by the allegation of error in the account. *Perry v. Atwood*,
8, 440

114. *Expenses of "winning" where separate seams are worked.* *Rokeby v. Elliot*,
8, 651

115. *Use of recitals in construction.*—The recitals preceding the operative words may be used to reach the intention when the operative words are of doubtful meaning, but they can not control the operative part where it is clear and unambiguous. *Walker v. Tucker*,
8, 673

116. *Idem.*—Recitals which do not express all that is included in the operative part of an instrument can not be held to be a full and clear expression of the intention of the parties. *Id.*

117. *Lessee's option to perform lessor's covenants and charge against the rent.* *Clark v. Babcock*,
8, 599

118. *Disclaimer of lessor's title and refusal to pay rent.*—Plaintiff claimed that the refusal to pay rent on the grounds that a certain party had so ordered, amounted to a disclaimer of her title, and that the corporation thereby forfeited its estate in the term under the deed of lease. *Held*, that the refusal to pay rent on the grounds stated did not work a forfeiture of the unexpired term. *Gale v. Oil Run Petroleum Co.*,
8, 1

119. *No disclaimer by words alone.*—An estate for years, in land,

LEASE—Rents and Royalties. Continued.

created by deed, will not be forfeited by a simple refusal to pay rent, or by any mere words, where there is no open act of hostility to the lessor's title. *Id.*

120. *The relation of landlord and tenant as to a covenant for payment of rent can be dissolved only by an agreement between themselves, which equity would enforce. Fisher v. Milliken,* 8, 395

121. *Measure of damages.*—The value of the coal raised by the lessees after the expiration of the twenty-one years' lease, was to be paid for by them at its fair market value as if they were purchasers, all expenses of hewing and raising being allowed. *Jegon v. Vivian,* 8, 628

122. *A mining lease provided for payment of taxes by the lessee; though the mine proved a loss, he was held bound for the taxes. Gibben v. Atkinson,* 15, 428

123. *Coal rent as liquidated damages.*—The rent per ton agreed for was stipulated damages to the extent of the non-performance. The uncertainty as to the extent of the injury is a criterion to determine whether it is a penalty or liquidated damages. *Powell v. Burroughs,* 8, 581

124. *The taking by lessee of his share of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms. Chicago Co. v. U. S. Co.,* 12, 570

125. *Compulsory production of books to ascertain rental value. Stuart v. White,* 5, 454

F. Assignment.

126. *Relation of lessor to tenant's assignee.*—There is a privity of estate between the lessor and the assignee of the lessee which makes such assignee liable for rents or royalties. *Watson Coal Co. v. Casteel,* 9, 130

127. *What will release assignor.*—Nothing but a surrender, a release or an eviction can, in whole or in part, absolve the tenant from the obligation of his covenant with his landlord. *Fisher v. Milliken,* 8, 395

128. *Assignor of lease bound, notwithstanding subsequent modifications. Fisher v. Milliken,* 8, 395

129. *Covenant against assignment not broken by subletting. Hargrave v. King,* 8, 408

130. *Assignee of recorded lease against parol tenant.*—The owner in fee let a tract of land for a term of years by lease duly executed and recorded. Afterward with the assent of the tenant he resumed possession of a part of the demised premises and let the same by parol to S. While S. remained in possession of such part, the tenant for years for a valuable consideration, conveyed all his interest to B., who had no knowledge of the lease to S. *Held,* that the parol lease to S. could not avail against ejectment brought by B. *Burr v. Spencer,* 8, 450

131. *Relation of lessor to equitable assignee.*—An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue such equitable assignee in equity on the covenants of the lease. *Cox v. Bishop,* 8, 455

LEASE—Assignment. *Continued.*

132. *Assignment of lease after covenant broken.*—The assignee of a lease containing covenant to commence a well within a time stated, is not liable for the breach when he took his assignment after such time had elapsed. *Washington Co. v. Johnson*, 16, 165

133. *Non-assignable lease.*—An indenture between land owner and certain skilled miners giving them the right to prospect and dig for gold at a fixed royalty, to have and to hold as long as the lessees might deem it worthy of search, creates no permanent estate in the land and is a lease which is not assignable. *Hodgson v. Perkins*, 16, 116

G. Forfeiture—Abandonment—Eviction.

134. *Right of re-entry, on breach, must be reserved*, to create a good condition upon which the term granted by a lease shall end before lapse by expiration of time. *Vanatta v. Brewer*, 6, 358

135. *Entry for non-payment.*—Where the tenant fails to comply with such covenant and the landlord has made demand at the time and place and in the manner prescribed by common law, and such demand is not complied with, the landlord may, at his option, enter upon the leased premises, or such part thereof as can be entered upon by him. *Bowyer v. Seymour*, 9, 67

136. *Election to bring ejectment.*—But if he does not re-enter, in fact, he may bring ejectment under § 16, Chap. 93 of the Code. *Id.*

137. *Forfeiture for default in payments* by holder of lease and option. *Christie's Appeal*, 9, 43

138. *Rights of tenant working quarry beyond the bounds of his lease.* *Sheldon v. Davey*, 8, 581

139. *Eviction of lessee—Rent—Recoupment.*—An eviction such as will suspend rent is an actual expulsion of the lessee out of all or some part of the demised premises; the rent already accrued and overdue is not forfeited by the eviction, but in an action for such rent, the tenant may defalk the damages caused by it. *Tiley v. Moyers*, 4, 330

140. *Recoupment by lessees for ejectment and estrepement.*—Where ejectment had been brought by the lessors to try the question of forfeiture, under a provision of the lease which forbade the tenant to let the mine stand idle for a year, in which they failed—damages therefor could not be allowed by the jury in action for the rent—but for the estrepement brought by them, which interrupted mining operations, damages were properly allowed and assessed by the jury under the charge of the court. *Id.*

141. *Effect of surrendering lease.*—Where a lessee of a mine makes a written surrender of his lease in view of a contemplated sale of his improvements and machinery to enable the lessor to make a new lease to the purchaser, the original lease, in law if not in equity, is canceled. *Stewart v. Munford*, 5, 555

142. *Coal lease construed with reference to forfeiture clauses.*—*Moyers v. Tiley*, 8, 474

143. *Surface lessee can not open new mines.* *Griffin v. Fellows*, 8, 637

LEASE—Forfeiture, etc. *Continued.*

144. *Eviction a good plea against lessor.*—Where the lessee under a lease allowing him both to farm and to mine, is prevented from exercising the right to farm, it is an eviction, and such eviction is a good plea to an action for breach of the covenants of the lease. *Walker v. Tucker*, 8, 678

145. *Lessee after virtual surrender estopped to deny forfeiture.*—*Wilmington Co. v. Allen*, 9, 106; *Sheldon v. Davey*, 8, 581

146. *A tenancy at will may be determined by one month's notice.* *Desloge v. Pearce*, 9, 247

147. *Penalty not enforced in equity.*—A court of equity will not entertain a bill filed against lessee of stone quarries to enforce the penalty under the statute (4 Geo. II, Ch. 28), nor compel a discovery in aid of an action to enforce the penalty against a tenant holding over. *Cross v. McClenahan*, 12, 669

148. *Idem.*—Equity will sometimes relieve against, but will never enforce a penalty. *Id.*

149. *Lease distinguished from sale—Lessor entitled to rescission of abandoned lease.* *Cowan v. Radford Co.*, 15, 458

150. *Facts of the case—No breach possible after forfeiture.* *Columbia Coal Co. v. Miller*, 9, 21

151. *Idem.*—Miller had confessed judgment to other persons, and after the breach by plaintiff of its covenants, and notice from Miller of the assuming of the agreement, the leasehold was sold under the judgment. *Held*, that this was not a breach by Miller; the agreement being at an end by reason of the precedent breaches of the plaintiff. *Id.*

H. Fixtures.

152. *Right to use tramways.*—Where the coal, upon severance, has become the property of the lessee, he has the right to enter and remove it, and to use the tramways for such purpose. *Lykens Valley Co. v. Dock*, 8, 571

153. *Construction of lease as to what is covered by "machinery."* *Foley v. Addenbrooke*, 8, 849

LEDGE.

1. *Meaning of "ledge" as used in charter, construed with context deeds and collateral evidence.* *Dexter Lime Rock Co. v. Dexter*, 4, 291

2. *Signification of "ledge."*—The term "ledge" discussed with reference to "hill or elevation," "layer or stratum," and "rock in place." *Id.*

See LODGE.

LEVEL.

1. *Evidence of local meaning of "level."* *Clayton v. Gregson*, 9, 141

2. *The word "level" when used as a mining term, in the coal district of Lancashire refers to the inclination of the strata, and not to a horizontal plane. The expression "below the level of the bottom of the mine" explained accordingly.* *Id.*

LIBEL.

1. *Slanderer of mine, liable in damages.* *Paul v. Halferty*, 9, 149
2. *Sale prevented by officious libel.*—Where one has been prevented from selling his land or other property by the malicious interference of another, he may maintain his action for the damage suffered. *Id.*
3. *Describing mine as "pockety."* *Held*, that the defendant was liable in damages. *Id.*
4. *Remedy in tort for the libel—Against vendee, on contract.*—If there had been a contract for the purchase of the land, binding upon the vendee, and he had refused to comply, being biased by such false representations, the remedy of the plaintiff would have been against the intending purchaser on his contract. *Id.*
5. *Article libelous on its face.*—When an article in a newspaper imputes to a person grave offenses and dishonest practices, which, if established, would bring him into general contempt and disgrace, it is actionable on its face. *Wilson v. Fitch*, 9, 155
6. *Proof of colloquium.*—When an alleged libel is actionable *per se*, and still a colloquium is inserted in the complaint, it is unnecessary to prove the colloquium. *Id.*
7. *When colloquium not necessary.*—A colloquium is not necessary, except when the libel is not actionable on its face, but has a covert libelous meaning. *Id.*
8. *Evidence of belief in action for libel*, excluded both as to justification and mitigation of damages. *Id.*
9. *Idem.*—If the libel assert the defamatory matter, not as a fact, but only as the belief of the author, or as a rumor, or general suspicion, the libel can not be justified by proof that the author believed it to be true, or that there was such a rumor, or general suspicion. *Id.*
10. *Proving the truth.*—In order to justify such publications of the belief of the author or of others, the defendant must prove the truth of the matter published. *Id.*
11. *Privileged communication—Proof of malice.*—The trustee of a private corporation is not a public officer in such a sense as to enable the publishers of a newspaper to claim an article published concerning him and criticising his conduct as trustee, as a privileged communication, and therefore compel such trustee, in an action for libel, to prove express malice. *Id.*
12. *Defamatory publication not privileged.* *Id.*
13. *Previous publication by others on same subject.* *Id.*
14. *Common rumor of guilt.* *Id.*

LICENSE.

1. *License defined.*—A license is an authority to go upon the land of the licensor, and do an act or series of acts there, but passes no estate or interest in the land. *East Jersey Co. v. Wright*, 9, 352
2. *Distinction between lease and license—Proper words to create each, stated.* *Doe v. Wood*, 9, 183; *Boone v. Stover*, 9, 326; *Gloninger v. Franklin Co.*, 9, 273
3. *A license is not exclusive unless the contrary be expressed or necessarily implied.* *Manning v. Frazier*, 8, 307; *Gloninger v. Franklin Co.*, 9, 273; *Dark v. Johnston*, 9, 233

LICENSE. Continued.

4. *Revocability*—A license may be terminated by notice. *Dark v. Johnston*, 9, 283
5. *But not without compensation.* *Dark v. Johnston*, 9, 283; *Fuhr v. Dean*, 6, 216; *Harkness v. Burton* 9, 318; *Beatty v. Gregory*, 9, 234
6. *Oil contract construed as license*, irrevocable unless compensation paid, but forfeited on account of assignment by licensee. *Dark v. Johnston*, 9, 283
7. *License distinguished from grant.* *Grubb v. Bayard*, 9, 199; *East Jersey Co. v. Wright*, 9, 332
8. *The right is without stint*, but is not exclusive of the owner of the soil. *Grubb v. Bayard*, 9, 199
9. *"All" construed.*—The use of the word "all," referring to the ore, is not necessarily exclusive of the owner's right; it describes the extent of the grant—not its exclusiveness. *Id.*
10. *Indivisibility.*—Such license is indivisible, and an assignee of an undivided interest (though the holder of all but a small fraction) has nothing and can not maintain action against the owner of the soil, excluding him from exercising the license. *Id.*
11. *Legislative charter, allowing mining from river beds.* *Bradley v. South Carolina M. Co.*, 9, 323
12. *Incidents of grant or license to take ore.* *Lord Mountjoy's Case*, 9, 175; *Silsby v. Trotter*, 3, 137
13. *License to work mines can only be granted by deed.* *Kamphouse v. Gaffner*, 2, 258
14. *License by parol good until revoked*—Not transferable. *Id.*
15. *License distinguished from easement.*—An easement can only be created by deed, but a license may exist in parol; a license creates no estate in the land. *Fuhr v. Dean*, 6, 216
16. *Right to mine reserved, is not an exclusive liberty.* *Chetham v. Williamson*, 9, 176
17. *An oral contract allowing a party "to mine and dig for lead and zinc ore according to mining usage," held*, to amount to an exclusive lease. *Sobey v. Thomas*, 4, 360
18. *One who constructs a tunnel for the purpose of mining ore under a license* from another with an understanding that he is to be reimbursed for his outlay from the licensor's share of the ore mined, has the right to the exclusive use of the tunnel, by implication, if in the exercise of reasonable diligence such exclusive use is necessary to enable him to mine the quantity of ore named in the license within the time limited. *Silsby v. Trotter*, 3, 137
19. *Parol license—How proven.*—A parol license which when given and executed should be upheld and enforced in equity, may be proven by parol; e. g., a license to use a ditch for conveying water across another's land. *Gooch v. Sullivan*, 5, 14
20. *Oral license to use water, valid but not assignable.* *Fabian v. Collins*, 5, 20
21. *Licensees are estopped from disputing the prior rights of the licensors*, and if third parties purchase such license, and enter into possession, their appropriation will only date from such possession. *Id.*

LICENSE. *Continued.*

22. *License by devise.*—A testator gave to three sons a tract of land to be divided among them in portions designated by the will, adding, "further I devise, etc., to my said sons each an equal privilege forever of the coal bank now opened and the ground on the ridge adjacent, so far as may be necessary for digging and taking coal." It seems that the privilege extended to every part of the tract containing coal which might be mined through the opening. *Carnahan v. Brown*, 5, 193

23. *How made perpetual.*—When the land was entered upon and the license made effectual by Watson's performance of the covenants and a successful result of the experiment, it became perpetual and irrevocable. *Rynd v. Rynd Farm Oil Co.*, 5, 275

24. *Extent of right created by parol license—Statute of Frauds.*—A parol license is a privilege to do some particular act upon the land of another, but as a license to mine purports to confer the right to carry away a part of the realty itself, it creates necessarily an interest in lands, is clearly within the Statute of Frauds, and must be in writing—otherwise it is effectual only to create an estate at will. *Desloge v. Pearce*, 9, 247

25. *License revocable only after compensation or notice—Statute of Frauds.*—Under a parol license to mine upon a royalty where the occupant has entered and made expenditures, the license can not be revoked without compensation, or giving the party the six months' notice to quit to which a tenant at will is entitled; and although such license is within the Statute of Frauds, still, when connected with the matter of improvements, it is voidable only after such compensation or notice. *Bush v. Sullivan*, 9, 214

26. *Grant of right to get ore—Statute of Frauds.*—Grant of right to get ore is an incorporeal hereditament or easement. A verbal contract conferring such a right, though not binding under the Statute of Frauds, will, nevertheless, operate as a verbal license, and, while unrevoked, will protect the person to whom it was given from *trespass quare clausum fregit*, for digging ore, and vest in him the property in the ore that is actually dug under it. *Riddle v. Brown*, 9, 219

27. *Parol license revocable but not assignable—Trespass. Id.*

28. *Incorporeal hereditament.*—A grant of the privilege of raising iron ore on the lands of the grantor at a certain price per ton, is an incorporeal hereditament; it is not a sale nor is it a mere license revocable at the will of the grantor. *Johnstown Iron Co. v. Cambria Iron Co.*, 9, 226

29. *Not exclusive.*—Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, his heirs and assigns. *Caldwell v. Fulton*, 81 Pa. St. 475, distinguished. *Id.*

30. *Licensee a tenant at will.*—A parol license to mine, reserving royalty, followed by expenditure made by the licensee, can not be terminated by the licensor without giving the notice to which a tenant at will is entitled. *Beatty v. Gregory*, 9, 234

31. *License limited to single vein.*—License to mine: *Held*, under the evidence, restricted strictly to working in the vein. *Upton v. Brazier*, 9, 243

LICENSE. *Continued.*

32. *When irrevocable.*—Unless coupled with an interest, or an equity has been created by acts done in pursuance of a license, a license is always subject to revocation in either of the following methods: (1) by the will of the licensor; (2) by the death of either of the parties; or, (3) by the conveyance of the land upon which it was intended to operate. *East Jersey Co. v. Wright*, 9, 382

33. *A licensee may not maintain ejectment*, at least not for mines beyond the limits of his actual workings. *Doe v. Wood*, 9, 182

34. *Licensee after revocation is a trespasser.*—One engaged in mining under a revocable license, which license has been revoked, becomes a mere trespasser if he continues to mine after the revocation. *Lockwood v. Lunsford*, 7, 582

35. *License a defense in tort.* *Arnold v. Richmond Iron Works*, 9, 198; *Desloge v. Pearce*, 9, 247

36. *Licensee's possession no defense to unlawful detainer.* *Neumoyer v. Andreas*, 9, 292

37. *License, within the Affidavit of Defense law.*—Cowan, by writing, granted to Johnston and others, as partners, the privilege to take clay from his land for twenty years, at twelve cents per ton, they to pay \$150 at the end of every six months, although they should not then have taken away so much clay as would amount to that sum. *Held*, that the writing was an instrument for the payment of money within the Affidavit of Defense law. *Johnston v. Cowan*, 9, 299

38. *Construction—Minimum rent.*—The writing was an agreement to pay for the privilege of taking clay, whether exercised or not, and the installments were neither liquidated damages nor a penalty, but an alternative price. *Id.*

39. *Refusal, by licensor, to specify place of digging*, after first place was exhausted, the contract saying he should fix such places: *Held*, a breach of his contract. *Hurd v. Gill*, 9, 306

40. *License by working under company rules—Revocation—Title in ore severed.*—In 1888, the proprietors of the Mine La Motte published a set of rules under which the miners signing them, had a right to extract minerals. In 1848 a new set of rules was promulgated, among them, the right of revocation being expressed. Plaintiff worked under the rules, and after notice of revocation, quit work, but afterward resumed, and extracted ore, which the company seized. *Held*, that the agreement was not a lease, but a license, revocable at the pleasure of the proprietors, and that the miner, after resuming against objection, was a mere wrongdoer, and acquired no title to the ore severed. *Lunsford v. LaMotte Lead Co.*, 9, 308

41. *Licensee's possession not adverse.*—In all cases, to raise a presumption of a grant, the possession must be adverse, and a licensee paying royalty has no adverse possession. *Desloge v. Pearce*, 9, 247

42. *License, with possession, not within the Statute of Frauds.*—A parol license to mine, under which possession has been taken, and which license is established by the evidence of the licensor himself, is not within the Statute of Frauds. *Anderson v. Simpson*, 9, 262

43. *Idem—License, without possession.*—But a license not followed by possession taken under it, is within the Statute. *Id.*

LICENSE. *Continued.*

44. *Irrevocable license—Estoppel.*—The rule that a license to do something on the licensor's land, followed by expenditure on the faith of it, is irrevocable, rests upon the principle of estoppel, because the parties can not be placed in *statu quo*. *Huff v. McCauley*, 9, 268

45. *Vested rights.*—Equity treats the license thus executed as a contract, giving absolute rights. *Id.*

46. *Statu quo.*—Where there has been only a consideration paid, there is nothing in the way of restoring the parties to their original condition. *Id.*

47. *Consideration not paid.*—A license is not converted into a contract, giving irrevocable interests in land, by the mere fact that a consideration was agreed to be paid for it. *Id.*

48. *Profit a prendre.*—A contract that one may take coal for his works from the land of another, is a right of profit *a prendre*, is incorporeal, and incapable of creation except by grant or prescription. *Id.*

49. *A parol license must be pleaded.*—In order to justify entry upon land, by the construction of a ditch under a parol license, the license must be pleaded. *Alford v. Barnum*, 10, 42

50. *License misnamed lease in the pleadings.*—The contents of the instrument being known to the defendant, is not such a variance as to authorize a non-suit. *Boone v. Stover*, 9, 326

51. *A general license to dump quarry strippings on adjoining land is deemed a continuing license, until revoked.* *Keeler v. Green*, 12, 465

52. *License by single co-tenant—Variance.*—In trespass by several tenants in common, a plea that defendants entered by license of the plaintiffs is not sustained by proof of such license from one of the co-tenants. *Murray v. Haverty*, 14, 325

53. *License by two only out of three co-tenants—Basis of accounting between co-tenants.* *Job v. Potton*, 14, 329

54. *Insufficient license.*—Evidence that a mine owner, being informed that persons had entered on a mining claim conflicting with his, under order of court, and were taking his ore, consented that another person should join them, does not establish a license to those already engaged in mining there. *Omaha Co. v. Tabor*, 16, 184

55. *Idem.*—It is proper to charge with reference to such alleged license that the owner must have consented that the persons claiming as licensees should enter through their own mine and take ore from his mine. *Id.*

LIEN.

1. *Equity liens are limited to vendor's liens.* *Ellison v. Jackson Water Co.*, 4, 559

2. *Mechanic's lien against lessee's interest.*—Although under the lease the lessee has the privilege of removing his machinery and fixtures, yet they are a part of the estate until severed from the soil, and a material-man or mechanic furnishing or erecting the same is entitled to a lien against the estate of the lessee therein. *Dobschuetz v. Holli-day*, 6, 108

LIEN. *Continued.*

3. *Surrender by lessee.*—A voluntary surrender by the lessee can not divest such a lien when once attached. *Id.*

4. *Purchaser becomes tenant.*—The owner of the fee neglecting to discharge the lien against the leasehold interest, in such a case would be compelled to accept another tenant. *Id.*

5. *Decree against such leasehold interest can not reach the fee.* *Id.*

6. *Tributer's lien on ore—Lien in the miner—Title in the operator.*—The owner of lands set apart certain lots to tributers, who were to receive a certain weight in lead for a certain weight in ore brought to bank, or cash, at their election. The contract specially provided that no interest in the ore should vest in the miners. *Held*, that the miners had no title in the ore and no right to sell it, but that they had a lien upon the ore and the right to retain possession till the compensation was paid or tendered. *Granby M. Co. v. Turley*, 9, 348

7. *Lien not affected by sale of partner's interest.*—Miners' wages by statute are a lien upon their debtors' property; but when a firm is the debtor, a judicial sale of the separate interest of one partner does not entitle the miners to preferred payment out of the money so made, because it does not affect nor divest their miner's lien. *Beatty's Appeal*, 9, 346

8. *Where a creditor's lien is not divested by a judicial sale, he has no claim on the proceeds.* *Id.*

9. *The description may be reformed in the decree, when defective in the lien notice.* *Tibbetts v. Moore*, 9, 348

10. *Delivery of materials.*—Materials may be held to be "furnished" when delivered, though not at the building for use in which they are intended. *Id.*

11. *Intervening lien claimants.*—Lien claimants appearing in obedience to the statutory notice to present their proof of lien, are not governed by the strict rules of intervenors. *Id.*

12. *Defects in the petition of an intervenor in summary proceedings under the Mechanics' Lien Law should be taken advantage of by demurrer.* *Id.*

13. *Variance as to party furnished.*—Where a lien notice stated that materials were furnished to Moore & Co., and the building was, in fact, owned by Moore alone: *Held*, that the material fact was, that the materials were furnished for and used in the construction of the building in question, and that the lien could be enforced against Moore. *Id.*

14. *A miner's lien law not retroactive in terms, will not be construed to give a lien for prior work.* *Hunter v. Savage M. Co.*, 9, 357

15. *Appropriation of payments.*—Where payments are made from time to time on account of labor, for a part only of which labor the miner has a lien, the payments will be credited against that part of the debt which is unsecured. *Id.*

16. *The complaint of a party claiming a miner's lien need not show whether the contract sued on was an express or whether an implied contract.* *Nolan v. Lovelock*, 9, 360

17. *Claiming in excess of the real amount does not vitiate the lien*
VOL. XVI—81.

LIEN. *Continued.*

for the real amount due. *Nolan v. Lovelock*, 9, 360; *Delaware Co. v. Oxford Co.*, 9, 417

18. *Liberal construction* to be applied to the Mechanics' Lien Law. *Hope M., Co., In re*, 9, 364; *Skyrme v. Occidental Co.*, 9, 371

19. *Repeal of the statute* after the lien has attached by the performance of the labor, but before the filing of the statutory notice, does not defeat the lien. *Hope Co. in re*, 9, 364; *Capron v. Strout*, 9, 391; *Skyrme v. Occidental Co.*, 9, 371

20. *Denial of legal conclusion.*—The denial that plaintiff has a lien is a mere traverse of a conclusion of law. *Bradbury v. Cronise*, 9, 366

21. *Co-tenant's lien for improvements preferred against mortgage.* *Stenger v. Edwards*, 9, 368

22. *No lien for receipts against each other.*—When one tenant has collected an excess of his share of the rents of the estate, no lien attaches in favor of the other tenant; his remedy is by action for an account. *Id.*

23. *Omission of allegation of time of filing lien notice.* *Skyrme v. Occidental M. Co.*, 9, 370

24. *Mechanics' liens are assignable.*—The lien may be enforced by action in the name of the assignee; the assignee of several claims may foreclose all in one action, and an assignment of the lien carries the debt. No particular form of words is necessary to constitute an assignment. *Id.*

25. *Improper joinder, cured.*—Where sundry lien claimants filed a joint lien, and afterward filed their several liens as they should have done in the first instance: *Held*, that they could treat the first filing as a nullity. *Id.*

26. *Day labor and contract work mingled.*—Work was done by many miners under the direction of the foreman, by the day, alternating with small contracts with sundry parties among the miners for running a few feet at so much a foot. *Held*, that it was one continuous transaction to be protected by a single claim for lien on behalf of each miner. *Id.*

27. *Effect of receiving note and filing on the note instead of for the labor.* *Id.*

28. *The acceptance of a promissory note*, without security, does not operate as a waiver of the lien given by the statute, unless an intention to relinquish such right is unmistakably manifested. *Delaware Co. v. Oxford Co.*, 9, 417

29. *Foreclosed in equity—Personal judgment.*—A proceeding to enforce a miner's or mechanic's lien is substantially a suit in equity, notwithstanding the practice of entering a personal judgment usual in such cases. *Davis v. Alvord*, 9, 364

30. *Initiation of lien must appear affirmatively.* *Id.*

31. *Occasional repairs.*—A lien after the work has been substantially performed can not be kept alive by occasional repairs. *Id.*

32. *Work on mill and mine.*—Work done on a quartz mill and work done in a quartz mine (separate some distance therefrom) is work done upon two different parcels of property, and the lien upon each can not,

LIEN. *Continued.*

by agreement, be apportioned arbitrarily between them, although done under one original contract. *Id.*

83. *The foreman of a mine is entitled to a lien. Capron v. Strout,* 9, 392

84. *Appropriation of payments.*—Where the foreman of a mine also boarded the employes and received money from time to time not exceeding his claim for board, without special appropriation of the fund to any particular item: *Held*, that he was not bound to apply it to the oldest claims but could credit it to the board account. *Id.*

85. *Hiring from month to month.*—A general hiring of miners at a per diem to be paid monthly, is a hiring from month to month. Either party may terminate it at the end of any month without notice though work has been done under it for many successive months. *Id.*

86. *Time for filing lien notice.*—Where the work has been continuous the statutory notice is good if filed within the statutory period after the last work, although the work has been going on under sundry successive contracts. *Id.*

87. *Mechanic's lien against oil well.*—One who contracts to drill an oil well and to furnish the tools, ropes, fuel, etc., to be used in the drilling, can file a mechanic's lien against the well for the work so done and the materials furnished, under the provisions of the second section of the act of March 7, 1873. *Vandergrift's Appeal,* 9, 897

88. *No lien for hauling quartz. Barnard v. McKenzie,* 9, 408; *Contra, In re Hope M. Co.,* 9, 364

89. *Equitable construction.*—Notwithstanding the mechanic's lien was unknown to the common law, yet in view of the equitable character of the statute, it should be liberally construed, but can not, by construction, be extended to cases not provided by the statute. *Barnard v. McKenzie,* 9, 408

40. *Proceedings strictly statutory.*—The proceeding to enforce a mechanic's lien is purely statutory, and the court has no authority to enter up a decree for a part of the claim, independent of the petitioner's right to a lien. *Id.*

41. *Jurisdiction of county courts in Colorado. Keystone Co. v. Gallagher,* 9, 406

42. *Lien relates to date of first item. Id.*

43. *Improvements feed the lien.*—A house built for the use of the mine and being part of the mining property, may be sold with the mine for the purpose of enforcing a lien under the statute. *Id.*

44. *Powder, steel and candles, furnished for the use of the mine, held,* to be clearly within the meaning of the statute, and materials for which a lien may be enforced. *Id.*

45. *Service by publication.*—Want of personal service and the non-appearance of a defendant, in an action to enforce a lien claim, will not vitiate a decree against such defendant, although before the commencement of the suit he had parted with his interest. *Id.*

46. *Manner of sale.*—The statute provides that the premises may be sold within the time and in the manner provided for sales on execution issuing out of any court of record. *Id.*

LIEN. *Continued.*

47. *Lien of superintendent.*—The general superintendent of a mining company is a laborer within the intent and meaning of the Miner's Lien Law. *Cullins v. Flagstaff Co.*, 9, 412; *Contra, Smallhouse v. Kentucky Co.*, 9, 388

48. *Scope of the lien law.*—The Mechanics' Lien Law is for the benefit of all persons who can bring themselves within its provisions. *Cullins v. Flagstaff Co.*, 9, 412

49. *Facts of the case.*—A was employed by a corporation to direct the work in its mine, with authority to employ and discharge miners, and procure and purchase supplies. It was also his duty to plan, oversee and direct the work in said mine, direct the shipment of ore, and generally to control the actual working and development of the same. *Held*, that he was entitled to a mechanic's lien. *Id.*

50. *Work on house and tunnel on same claim.* *Dickenson v. Bolyer*, 9, 415

51. *Lien of laborers against insolvent corporations.*—Under the act providing a special lien for laborers, in cases where corporations become insolvent, the lien comes into existence as of the date which the court fixes to be the time when the insolvency occurred, and applies only to laborers at that time in their employ, and does not cover an outstanding unpaid claim for labor by a former employe. *Delaware Co. v. Oxford Co.*, 9, 417

52. *The presentation of a claim embracing items other than charges for wages*, does not work a forfeiture of the right of lien for the wages, given by the statute. *Id.*

53. *Lien covers old debts for wages.* *Id.*

54. *Void cancellation of incumbrance.*—An incumbrance upon land in the nature of a coal lease held by McC. in trust for the firm of McC., B. & Co., can not be canceled and annulled by an instrument signed by the firm name, and money paid for such an instrument can not be recovered in an action upon a covenant in a prior deed against incumbrances. *Stambaugh v. Smith*, 15, 83

55. *Lien of partner.*—When a managing partner, a co-lessee, working mines, becomes indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. *Fereday v. Wightwick*, 11, 247

56. *Lien of partner against assets.*—It is a general principle that each member of a partnership has a specific lien on the partnership property, not only for the debts and liabilities due to third persons, but also for his own share of the capital stock and funds and for all moneys advanced by him for the use of the concern. *Duryea v. Burt*, 11, 395

57. *Real estate as partnership assets.*—Real estate acquired by mining partners for the purpose of the partnership concern, is subject to all the debts of the partnership and subject to the debts of one of the partners incurred in the administration of the property. *Id.*

58. *Purchase of interest subject to lien—Notice, when presumed.* *Id.*

59. *Lien claimed by representer of claim.*—Where plaintiff con-

LIEN. Continued.

tracted verbally with the owner of an interest in a mining claim to represent his interest at a certain rate, to be paid out of the proceeds: *Held*, that his contract created no lien against an innocent purchaser, without notice. *Jenkins v. Redding*, 14, 647

60. *Judgment lien confined to specific property.*—Under the precedents in Pennsylvania, in a proper case the lien of a judgment and the execution on the judgment may, by the verdict of a jury, be restricted to specific lands, articles or proceeds. *Hoeverler v. Mugele*, 14, 654

LIS PENDENS.

1. *Necessity of.*—Under the California statute, the mere pendency of a suit does not charge the purchaser of the subject of it as a purchaser *pendente lite* at common law. To have that effect a notice of *lis pendens* must be filed or appear of record. *Head v. Fordyce*, 12, 470

LOCATION.

- A—IN GENERAL.
- B—DISCOVERY.
- C—NOTICE.
- D—STAKING—MONUMENTS—DESCRIPTION.
- E—RECORD.
- F—BY AGENT.
- G—LODES—PLACERS.
- H—SURFACE.
- I—SIZE OF CLAIM—LENGTH—WIDTH—END LINES.
- J—SIDE VEINS.
- K—APEX—DIP.
- L—TIME—PRIORITY.
- M—POSSESSION.
- N—TRESPASS—INTIMIDATION.
- O—EVIDENCE—PRESUMPTIONS.

A. In General.

1. *Location described.*—Location consists of a number of distinct acts; all must be performed before a legal location exists. *Gonu v. Russell*, 12, 630

2. *The word "location" construed.*—The word "location," as found in the written laws of White Pine mining district, refers to the aggregate of ground claimed as a mine, and not to the interest of a single tenant in common, nor to any specific number of feet or section of the mine. *Lect v. John Dare M. Co.*, 4, 487

3. *"Location" and "Mining Claim" distinguished.*—A mining claim may embrace one or more locations. *St. Louis Co. v. Kemp*, 11, 678

4. *Legal effect of location.*—A valid and subsisting location has the effect of a grant from the United States of the right of possession to the land located. *Gwillim v. Donnellan*, 15, 482

5. *Must be valid against United States. Id.*

6. *The government holds the title in trust for those who locate veins on the public domain and for their vendees.* *Noyes v. Mantle*, 15, 611

LOCATION—In General. Continued.

7. *Only the unoccupied and unappropriated mineral lands of the general government are subject to exploration and location.* *Armstrong v. Lower*, 15, 681
8. *Locator's right exclusive* when he has fully complied with the law. *Id.*
9. *Location is a question of fact.* *Eilers v. Boatman*, 15, 471
10. *Location of mining over tailings claim.* *O'Keiffe v. Cunningham*, 9, 451
11. *Location by miners before passage of mining statute.* *Sullivan v. Hense*, 9, 487
12. *In the year 1860, a valid location of a mining claim on the public domain could be made only according to the rules, usages and customs of miners in the district where such claim was situate.* *Id.*
13. *Purchaser may perfect title.* *Zeckendorf v. Hutchison*, 9, 488
14. *Nominal location without development.*—A location made in 1865, under district rules, by posting a notice and filing a record, not followed by development, will not be upheld; if the rule allowed so loose a location it would be unreasonable. *Cons. Rep. Mt. Co. v. Lebanon Co.*, 15, 490
15. *A corporation may locate a mining claim, but to maintain its adverse for the protection of the same it must be shown to be a corporation, local to the United States, and that its members are persons who might individually become valid locators.* *Thomas v. Chisholm*, 16, 123
16. *Manner of location under Idaho statutes considered.* *Kramer v. Settle*, 9, 561

B. Discovery.

17. *Mineral must be first discovered.*—No valid location of a mining claim can be made until a vein or deposit of gold, silver, or metaliferous ore or rock in place has been discovered. *Overman Co. v. Corcoran*, 1, 691
18. *Evidence of the value of a vein*, disclosed after the location, is immaterial to the question of the locator's title, as no discovery after location would make that location valid. *Upton v. Larkin*, 15, 404
19. *Discovery of mineral made after location* will not validate a location made without any discovery of mineral before location. *Id.*
20. *A mining location made without prior right of entry* upon the ground is void. *Aurora Hill Co. v. 85 M. Co.*, 15, 581
21. *Claim to lode by discoverer—Evidence of good faith.*—Evidence that the discoverer of a lode of mineral had worked almost continuously on the lode, from the time of discovery to the beginning of an action contesting his claim, corroborated by witnesses, and by the amount of work performed, is sufficient to establish his good faith in making a claim to the lode. *Omar v. Soper*, 15, 496
22. *First discoverer neglecting to locate*, loses the right as against subsequent parties who do locate. *Gleeson v. Martin White Co.*, 9, 429
23. *A location based on discovery* can be made only by the discov-

LOCATION—Discovery. *Continued.*

erer, or by one who claims under him; and if the discovery fails the location falls with it. *Guillim v. Donnellan*, 15, 482

24. *Time allowed.*—Upon the discovery of a lode bearing silver in the public lands, a citizen is entitled to locate a full claim, and he has the time allowed by law to complete the location. *Erhardt v. Boaro*, 4, 484

C. Notice.

25. *Location notice, where placed.*—It is sufficient if the notice is placed in such reasonable proximity and relation to the ledge as in connection with the work done under it, to give notice to all comers what ledge is intended. *Phillpotts v. Blasdel*, 4, 842

26. *A notice is evidence of possession*, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. It forms one of a series of acts, which, taken together, make the right perfect. *Thompson v. Lee*, 1, 611

27. *Extent of location, how proven—Explanation of notices.*—A witness who testifies that plaintiff's location was made by posting notices and marking boundaries, may testify whether the disputed premises are included within such boundaries, and an objection that the notices are the best evidence of the extent of the location is not well taken. *Kelly v. T aylor*, 5, 598

28. *The fixing of a location stake* does not perfect a location; the marking of the boundaries is essential. *Gonu v. Russell*, 12, 680

29. *Locator can not oust co-tenant by posting new notice—The rights of his associates vested.* *Morton v. Solambo Co.*, 4, 468

D. Staking—Monuments—Description.

30. *Natural objects and permanent monuments.*—The intention of the statute is to give one seeking to identify a recorded claim something in the nature of an initial point from which to start. The identification must be by reference to some natural object or permanent monument. *Drummond v. Long*, 15, 510

31. *It is not so much the character of the monuments*, as satisfactory proof of their location, that is to fix the *locus in quo*. *Cullacott v. Cash M. Co.*, 15, 392

32. *The existence and location of monuments* may become questions of fact, to be determined like other questions of fact, according to the rules of evidence. *Id.*

33. *Maintaining stakes.*—Whatever may be the duty of a locator to maintain his stakes, he can not be expected to renew, as early as January, stakes set up the previous fall. *McEvoy v. Hyman*, 15, 897

34. *Monuments control course and distance.* The discovery cut and stakes are monuments. *Id.*

35. *Staking.*—Staking boundaries does not of itself amount to a location. *Golden Fleece Co. v. Cable Co.*, 1, 120

36. *Permanent monuments.*—The question as to whether an object described in a notice of a location of a mining claim is a permanent monument is a matter for proof and can not be determined by the

LOCATION—Staking, etc. *Continued.*

court from an inspection of the location notice. *Metcalf v. Prescott*,
16, 137

37. *Staking required by district rules.*—The miners' regulations of Gregory district, adopted in 1860, required the locator to indicate, by stakes or otherwise, upon the surface, the ground or the vein sought to be appropriated. *Becker v. Pugh*, 15, 304

38. *Fencing not necessary to possession of mining claims.* *Rogers v. Cooney*, 14, 85

39. *Sufficiency of staking, a jury question.*—The marking of a claim must be such that the boundaries may be readily traced, and whether or not the marking conforms to this requirement is a question for the jury. *Taylor v. Middleton*, 15, 284

40. *The natural objects and permanent monuments need not be on the ground located, although they may be.* The natural object may consist of any fixed natural object, and a permanent monument may consist of a prominent post or stake firmly planted in the ground, or a shaft sunk in the ground. *North Noonday Co. v. Orient Co.*, 9, 530

41. *Identifying claim.*—Whether the record calls were sufficient to identify the claim—submitted as a question of fact for the jury. *Id.*

42. *Marks and stakes.*—The physical marks sufficient to serve as notice of the possession of a mining claim, must be of sufficient prominence to be found by one honestly concerned, to discover whether the land has been previously appropriated for mining purposes. *Hess v. Winder*, 12, 217

43. *Insufficient location.*—Posting notice upon a five-sided tract, claimed for mining purposes, and the marking of three of its corners, in the absence of any mining district rules in the district, held, no valid or sufficient location or possession. *Id.*

44. *Marking boundaries.*—A location must be distinctly marked on the ground so that its boundaries can be readily traced. Any marking on the ground claimed, by stakes and monuments and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. *North Noonday Co. v. Orient Co.*, 9, 530

45. *Sufficient marking, by end stakes and notices.*—The marking of the center line of the claim by a prominent stake or monument at each end, with a written notice on one or both, claiming from stake to stake, with a specified number of feet in width on each side of the line, is sufficient compliance with the law. *Id.*

46. *Staking the discovery and center line sufficient.* *Gleeson v. Martin White Co.*, 9, 429

47. *Marking corners and center lines.*—Stakes and stone monuments set at each corner of the claim and at the center of each end line, is a sufficient marking of the boundaries, under the most stringent construction of the act of Congress. *Southern M. Co. v. Europa M. Co.*, 9, 513

48. *Essential requirements in location.*—When under district rules it is required that the boundaries be marked with a ditch, and that stakes be placed at the corners, and these regulations are not complied with, no valid location is made. *Myers v. Spooner*, 9, 519

LOCATION—Staking, etc. *Continued.*

49. *Insufficient marking of boundaries.*—The posting of a notice of claim on a tree at each end of a claim is not a compliance with Sec. 2324, U. S. Revised Statutes, requiring a location to be distinctly marked upon the ground so that its boundaries can be readily traced. *Holland v. Mt. Auburn M. Co.*, 9, 497

50. *Boundaries must be marked.*—Since the passage of the Mining Act of May 10, 1872. *Gelcich v. Moriarty*, 9, 498

51. *Obliteration of monuments.*—After a location has been lawfully made, the right of the locator can not be divested by the mere obliteration of the marks or removal of the stakes without his fault, he having performed the other acts required by the statute. *Jupiter Co. v. Bodie Co.*, 4, 412

52. *How location to be marked.*—A location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced; but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds and written notices, whereby the boundaries can be readily traced is sufficient. *Id.*

53. *The natural objects or permanent monuments are not required to be on the ground located*, although they may be; and the natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground or of a shaft sunk in the ground. If by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not. *Id.*

54. *Monuments not placed on account of precipice.* *Eilers v. Boatman*, 15, 462

55. *Failure to mark its boundaries is fatal to the attempted location of a mining claim*, although the location be of a governmental subdivision. *Anthony v. Jillson*, 16, 26

E. Record.

56. *The law of Congress requires no record of a mining claim except in obedience to valid local rules or customs of miners*; but when such local rules or customs require a record it must contain the names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify the claim. *Jupiter Co. v. Bodie Co.*, 4, 411

F. By Agent.

57. *The law makes the discoverer the agent of those for whom he chose to act*, and makes his act their act, regardless of whether they have any knowledge of it or not. *Morton v. Solambo Co.*, 4, 463

58. *Presumption of assent to use of name.*—A party in whose name a location of a mining claim is made is presumed, *prima facie*, to assent to the same. *Van Valkenburg v. Huff*, 9, 467

59. *The locator named is owner.* *Id.*

LOCATION—By Agent. *Continued.*

60. *Location and development contract construed*, holding that when the location was recorded, all the persons named as locators became tenants in common, and that one could not convey or encumber the interest of another. 2. That only those who signed the contract were bound. 3. That the prospectors had no defense as against plaintiff's claim under the location. 4. That these rulings amounted to "flagrant injustice" but were compelled by "the clear rules of law." *Chase v. Savage M. Co.*, 9, 476

61. *Location by absent outfitters*.—The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines to hold claims without personally preempting them, is not against public policy, and should be upheld. *Boucher v. Mulverhill*, 12, 350

62. *Citizens may locate by agent*. *Murley v. Ennis*, 12, 360

G. Lodes—Placers.

63. *Locations of lodes and placers distinguished*. *Moxon v. Wilkinson*, 12, 603

64. *Placers*.—Parties may locate and occupy placers jointly. *Chapman v. Toy Long*, 1, 497

65. *Proof of lode within claim*.—On the public domain, a miner may hold the place in which he may be working, against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length, and 800 feet in width, he must prove a lode extending throughout the claim. *Zollars v. Evans*, 4, 407

H. Surface.

66. *Relation of vein to location*.—It is true that the vein is the principal thing and the surface only an incident thereto, but the location is of a piece of land including the vein. *Gleeson v. Martin White Co.*, 9, 429

67. "Location" includes surface. *McCormick v. Varnes*, 9, 506

68. *Claim to vein limited by surface lines*.—It is clear that the government did not intend, by the act of Congress of July 26, 1866, to authorize the miner to locate, or itself to grant, two separate and distinct estates in a mining location, one in the surface ground, and the other in the vein or lode, whenever the latter might be found to run in its course, without regard to the surface ground. *Id.*

I. Size of Claim—Length—Width—End Lines.

69. *As to length of claims by district record*.—In the absence of better evidence, the rule or custom of a mining district as to the length of claims located in the district may be proved by the uniform usage of recording a certain number of feet. *Sullivan v. Hense*, 9, 487

70. *Implied limit to size of claim—General usage*.—When there is no regulation limiting the size of a claim there is nevertheless an implied limit. No location can be so extended as to amount to a monopoly, and in the absence of local regulations prescribing a limit,

LOCATION—Size of Claim, etc. *Continued.*

resort must be had to general usage. *Table Mountain Co. v. Stranahan*, 9, 457

71. *End lines*.—The provision of the mining laws requiring the end lines of each claim to be parallel is merely directory, and no consequences attach to a deviation from such provision. *Horswell v. Ruiz*, 15, 488

72. *A party taking up a claim in excess of the legal limit* may hold the excess against a mere intruder, but not against a subsequent locator. *English v. Johnson*, 12, 203

73. *End lines*.—The provision of the act of 1872, requiring the end lines to be parallel, is directory merely. "End lines," though not named in the act of 1866, are necessarily implied. *Eureka Co. v. Richmond Co.*, 9, 578

J. Side Veins.

74. *Old locations entitled to the side veins*.—Section three of the Mining Act of May 10, 1872, recognizes as valid, locations of mining claims made prior to its passage, and confirms the locators thereof in the exclusive possession of all the lodes which have their apex within the surface lines of such mining claims. *Mount Diablo Co. v. Calhoun*, 9, 616

75. *Change in system of location by act of May 10, 1872*.—The custom long prevailed on the Pacific slope to locate a single vein by means of a notice posted on the croppings without any definition of boundaries, and to follow the vein wherever it ran to the extent of the feet claimed; the act of May 10, 1872, has changed all that. The location now is of a *piece of land* with all the veins it may contain. *Gleeson v. Martin White Co.*, 9, 429

76. "*Single vein*" under old law; "*all veins*" under act of 1872. *Blake v. Butte M. Co.*, 9, 503

K. Apex—Dip.

77. *Location on the strike*.—The vein is the principal thing, and the location should be made in conformity with the strike thereof. *Armstrong v. Lower*, 15, 681

78. *What a mining location covers—Apex—Dip—Lode in place*.—The law provides that upon a location properly made, the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex within the lines of the location; and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location. But such vein or lode must be *in place*. *Iron Silver M. Co. v. Cheeseman*, 9, 532

79. *Location failing to cover the lode*.—A location of a mining claim, upon a lode or vein of ore, should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the mining act of 1866 as under that of 1872. If located otherwise the location will only secure so much of the lode or vein as it actually covers. *Flagstaff M. Co. v. Tarbet*, 9, 607

LOCATION—Apex—Dip. *Continued.*

80. *If a location be laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof for the purpose of defining the rights of the owners.* *Id.*

81. *The top or apex, on a junior discovery—Senior location on the "dip" will hold.* *Van Zandt v. Argentine Co.,* 4, 441

82. *The locator owns only what his lines inclose although not chargeable with fault in making them,* *Iron Silver Co. v. Elgin Co.,* 15, 641

83. *Side veins within the lines—Top or apex.*—The locator of a lode claim is entitled not only to the vein discovered but to every other vein throughout its entire depth, the top or apex of which lies within his surface lines extended downward vertically. *North Noonday Co. v. Orient Co.,* 9, 590

84. *Vein can be followed beyond, only on its dip.*—Under the provisions of sections 2 and 4 of the act of Congress of July 26, 1866, the right to follow a vein claimed under a mining location, is expressly confined to *depth*, and such act can not, by any fair construction, be made to apply to the strike or course of the vein. *McCormick v. Varnes,* 9, 506

85. *Location must follow the strike.*—The location of a mining claim should be made along the course of the vein or lode, so as to include the same within its boundaries; otherwise it will only secure so much of the lode or vein as it actually covers. *Id.*

L. Time—Priority.

86. *Reasonable time to trace vein and complete location.* *Gleeson v. Martin White Co.,* 9, 429; *Patterson v. Hitchcock,* 5, 549; *Murley v. Ennis,* 12, 360

87. *Priority between locations.*—Where the first location of a mining claim is valid, and the parties have kept it so by doing what is required by the mining laws, a subsequent location, however regular in form, is of no effect. *Garthe v. Hart,* 15, 493

88. *Distinction between first occupant, intruder and statutory locator.* *Id.*

89. *Facts of the case—Title affirmed to first occupant.*—The Golden Bell was discovered in February, 1883. Its location notice was placed and its shaft sunk the legal depth within the statutory period, but its record was not made within the time fixed by law. In April, the Verde was discovered and its location and record completed. Afterward, and after the lapse of the statutory period, the location certificate of the Golden Bell was recorded. *Held,* that the Golden Bell took the ground in conflict. *Omar v. Soper,* 15, 496

90. *Location of ditch—Reasonable diligence.*—In the locating of ditches, a base line is generally first run to ascertain whether the water in the stream can be made to flow to the point where it is intended to be used. The line upon which the ditch is actually intended to be dug should afterward be run within a reasonable time, which must

LOCATION—Time—Priority. Continued.

depend upon the circumstances of each particular case. *Parke v. Kilham*, 4, 522

91. *Prior location must file adverse claim. Eureka M. Co. v. Richmond M. Co.*, 9, 578

92. *Location completed after statutory period.*—A subsequent locator can not object that all the steps necessary to a valid location were not performed at the time of the location, provided they were performed before other rights attached. This rule applies to the objection that the claim was not properly staked, or that its record was not made within the statutory period, or that its discovery shaft was not sunk to mineral at the time of its survey. *McGinnis v. Egbert*, 15, 329

93. *Locating over a working prospect.*—Where defendants were in actual possession of a mining claim, and engaged in developing it, claiming to be the owners, plaintiff can not initiate a title thereto by a survey and the recording of a location certificate. *Omar v. Soper*, 15, 496

94. *Prior location against senior record. Gregory v. Pershbaker*, 15, 602

95. *A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim. Jupiter Co. v. Bodie Co.*, 4, 412

96. *Evidence—What shall be, of prior location.*—Proof of the date of plaintiff's location, the others not being shown, and the fact that plaintiff's location is excepted from defendant's patents, will raise a presumption that plaintiff's location was first made. *Van Zandt v. Argentine Co.*, 4, 441

97. *Location perfected before adverse claim exists.*—A subsequent locator has no right to object to a location as not sufficiently marked at the time of its location, or before recording, *provided* it was sufficiently marked before any rights had accrued to such subsequent locator. *North Noonday Co. v. Orient Co.*, 9, 580

M. Possession.

98. *Modes of holding a mining claim.*—A mining claim on the public domain may be held either by actual occupancy and the exercise of control over it by distinctly indicating the boundaries by monuments and marks, or by occupancy in accordance with the local mining customs. *Hess v. Winder*, 12, 217

99. *Distinction between pure occupancy and a locator's title. Armstrong v. Lower*, 15, 458

100. *Effect of actual possession without valid location. North Noonday Co. v. Orient Co.*, 9, 524

101. *Possession of a mining claim without location is valueless against a location made and sustained in compliance with the law. Hopkins v. Noyes*, 15, 287

102. *A miner has no rights beyond the ground actually occupied, as*

LOCATION—Possession. *Continued.*

- against other parties prospecting the ground, except by compliance with the statutory requirements concerning location. *Becker v. Pugh*, 15, 804
108. *Location to prevail against prior possession. Horswell v. Ruiz*, 15, 488

N. Trespass—Intimidation.

104. *It is an elementary rule that no man may profit by his own wrong*, and he that prevents the doing of a thing may not complain of its non-performance. *Miller v. Taylor*, 9, 547
105. *Discoverer adopting location of his ejector.*—A discoverer wrongfully ousted by a wrongdoer, may adopt as his own the survey and location perfected by the party who drove him out of the possession. *Id.*
106. *Completion of location prevented by force. Robinson v. Imperial Co.*, 10, 370
107. *A wrongdoer is not permitted to profit by his own wrong. Id.*
108. *Location prevented by intimidation.*—That the discoverer is prevented from completing location within the prescribed time by intimidation on the part of an adverse claimant, is sufficient excuse, and will not deprive him of his right to locate the claim. *Erhardt v. Boaro*, 4, 482; S. C., 15, 472
109. *Parties seeking the protection of a court of equity against alleged trespassers* upon a mining claim must show a substantial compliance with the law authorizing the location thereof. *Chapman v. Toy Long*, 1, 497
110. *Estoppel—Trespasser.*—One who goes on ground taken up by another for mining purposes, during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents the first locator from completing his title, shall not be permitted to allege any defect in that title. *Erhardt v. Boaro*, 4, 484
111. *Acts of location must be stated. Zeckendorf v. Hutchison*, 9, 488
112. *Entry upon possession with intent to initiate location.*—Where, in an action for unlawful entry, the evidence showed that the defendant entered upon mining ground in the possession of the plaintiff without previous color of right, but under the claim that plaintiff's location was void, and with intent to re-locate, it was held, that a party can not enter for the purpose of obtaining title, but must have it before he enters; and the court refused to instruct the jury that if defendant entered upon the lands peaceably and in good faith, believing that they were open to location, the entry in such case was not unlawful. *Phenix Mill v. Lawrence*, 12, 261
113. *Location over drift run beyond its claimant's lines.*—The fact that the vein underneath a location was being worked by a party who was following a vein after it had left its patented side lines, does not vitiate the location of the ground so made over such workings. *Ellers v. Boatman*, 15, 462
114. *Secret underground mining by parties having neither a pat-*

LOCATION—Trespass—Intimidation. *Continued.*

ented or possessory title, will not prevent a valid location by third parties, on the surface embracing the apex of the lode. *Id.*

115. *Location by trespass on third parties.*—Section 256 of the Code, does not prevent the admission of proof showing a failure to perform one of those acts essential to a valid location, though such proof also establishes the fact that actionable injuries were done to third parties, who are neither parties nor privies to the action. *Armstrong v. Souer*, 15, 631

O. Evidence—Presumptions.

116. *Validity of location, when not to be questioned.*—The regularity and validity of the location of a mining claim, can not be questioned in a suit in ejectment, where both parties claim title under the original locators. *Union M. Co. v. Taylor*, 5, 823

117. *Evidence of location.*—Prominent and permanent monuments, and stakes at the corners, properly posting notices, and distinctly marking the location on the ground, sufficiently establish the location and boundaries of a mining claim; but whether or not a sufficient location has been proved, is a question of fact. *Du Prat v. James*, 15, 841

118. *Res gestæ—Declarations of locator.*—The declarations of the locator of a mine made long after the time of the location, are not of the *res gestæ*; declarations to be *res gestæ* must be a part of an act, or made while such act was being performed. *Kramer v. Settle*, 9, 561

119. *Location presumed where possession held during period of statute of limitation.* *Harris v. Equator Co.*, 12, 178

120. *Distinction in favor of purchaser.*—The purchaser of mining ground may occupy a position different from the locator. As against the government, only strict compliance with the law regulating location, will avail, but the purchaser has a better right as against other citizens seeking to locate the same ground. *Id.*

121. *Presumption in favor of location.* *Cheesman v. Hart*, 15, 263

122. *Presumption that the location covers the vein.*—A location of a lode mining claim will be presumed to include the vein upon which the discovery was made, until the contrary appears. *Patterson v. Hitchcock*, 5, 548; *Armstrong v. Lower*, 15, 631

123. *And where another by a subsequent and conflicting location undertakes to hold a portion of the prior claim on the ground that the lode thereof does not extend to the conflicting area, the burden of proving such fact is upon the subsequent locator.* *Armstrong v. Lower*, 15, 631

124. *Plaintiff must prove location.* *Sullivan v. Hense*, 9, 437

LOCATION CERTIFICATE.

1. *Purpose of.*—A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's exclusive possession and enjoyment of his mining location granted by the act of Congress of May 10, 1872. The purpose of description is to identify the claim with reasonable certainty. *Pollard v. Shively*, 2, 220

LOCATION CERTIFICATE. *Continued.*

2. *Location notices should be liberally construed*, having reference to the circumstances under which, and the character of the parties by which, they are generally made. *Weill v. Lucerne Co.*, 3, 373
3. *Admission of paper title—Defective location certificate may be amended.* *Van Zandt v. Argentine Co.*, 4, 441
4. *Immateriality of the location notice*, except during the period pending the completion of the staking and record, considered. *Gleeson v. Martin White Co.*, 9, 429
5. *The location notice need not contain a description of the claim* by reference to natural objects or permanent monuments; that is required only in the record. *Id.*
6. *When contents may be shown.*—Where, to prove the priority of their possession of a mining claim, plaintiffs relied upon a notice which had been posted on a tree on the claim, and produced a witness who swore to have often seen the notice, and that when last seen it was part torn and the rest illegible: *Held*, that this was sufficient proof to let in parol evidence of its contents, and that stricter proof in this class of cases should not be required. *Dunning v. Rankin*, 9, 435
7. *Certificate not conclusive.*—The certificate of location required to be made by the probate judge (under the New Mexico statute), is not conclusive evidence of a compliance, by the locators, with the requirements of the law. No act done in a mere ministerial capacity can be conclusive evidence. *Zeckendorf v. Hutchison*, 9, 483
8. *Location notice, no marking of boundaries.*—A location notice placed on the center of the claim and calling for a definite length and width: *Held*, not a compliance with such act requiring the marking of boundaries. *Gelcich v. Moriarty*, 9, 493
9. *Record not stating length of claim.*—The record of a lode claim not stating the number of feet claimed is admissible in evidence and is a compliance with the statute requiring a record to be made, and with the customary form in which they have been made. *Conner v. McPhee*, 9, 571
10. *Insufficient proof to admit copy—Original location certificate absent at land office.* *Stapleton v. Pease*, 9, 574
11. *Surprise.*—A party can not claim surprise at an attack upon a paper as not the original where he is shown to have known of the existence and whereabouts of another paper which was in fact the original. *Id.*
12. *The identity of persons* is always presumed from the identity of names. *Id.*
13. *A notice of location of a mining claim should contain a description of the premises* located, and the same should be marked on the ground. *Kahn v. Old Telegraph Co.*, 11, 647
14. *Record treated as the original notice.*—The county record of a notice of location, though taken from a draft on paper, may be, by custom, the original notice of the location of a mining claim. *Pralus v. Pacific Co.*, 12, 478
15. *A location certificate calling for its own discovery cut and its own stakes* is defective when it contains no reference to a natural

LOCATION CERTIFICATE. *Continued.*

object or permanent monument (to fix the locus of the claim). *McEvoy v. Hyman*, 15, 397

16. *Amendment to location certificate favored—Re-location retroactive.*—The first record of a mining claim is usually, if not always, imperfect, and it is the policy of the law to give the locator an opportunity to correct his record when defects are found therein, and when it is so corrected the amendment takes effect with the original as of the date thereof. *Id.*

17. *Failure to record location certificate immaterial.* *Omar v. Soper*, 15, 497

18. *A lode location certificate must contain a sufficient description*, by reference to natural objects or permanent monuments. But it is not for the court, from the description, to say that its calls are not proper monuments. *Russell v. Chumaseo*, 15, 508

19. *A location certificate calling only for its own stakes and for adjoining claims*, may be good if such claims are found on the ground with definite corners and boundaries. *Id.*

20. *Location certificate held void for uncertainty, set forth at length in the statement.* *Drummond v. Long*, 15, 510; *Faxon v. Barnard*, 9, 515

21. *Where a record is not required by statute nor by district rule the making of one is of avail for no purpose.* *Anthony v. Jillson*, 16, 26

22. *Vague call upheld.*—"About fifteen hundred feet south of Vaughn's Little Jennie Mines:" Held, a sufficiently definite description. *Hammer v. Garfield Co.*, 16, 125

23. *Presumption that the tie is valid.*—The tie called for in a location certificate will be presumed to be a well known natural object or permanent monument until proof is made to the contrary. *Id.*

24. *Absence of convenient ties—Description by the claim's own stakes.* The provision in Rev. Stat., Sec. 2324, that records of mining claims shall contain such "reference to some natural object or permanent monument as will identify the claim," means only that this is to be done when such reference can be made; and when it can not be made, stakes driven into the ground are sufficient for identification, or a reference to a neighboring mine, with distance and date of location, which will be presumed to be a well known natural object in the absence of contradictory proof. *Id.*

25. *The statutory verification to the location certificate is prima facie evidence of the citizenship of all the locators.* *Id.*

26. *Where the proper county is not called for in the certificate, but the description is otherwise sufficient so that the claim could be found, the name of the county may be rejected as surplusage and the record will hold as valid.* *Metcalf v. Prescott*, 16, 137

27. *Surplusage.*—When an instrument, as a location notice, contains sufficient description to ascertain the premises to which it applies without the aid of a portion of the description, which is false, the latter portion may be regarded as surplusage. *Id.*

28. *Null affidavit.*—A location notice, the affidavit to which does

LOCATION CERTIFICATE. *Continued.*

not contain notarial evidence that the party making it took an oath, or was ever present before the officer, is not a "declaratory statement in writing on oath," within the meaning of Section 1477, fifth division of the Compiled Statutes. *Id.*

29. *Proof aliunde of the verification not allowed. Id.*

See RECORD.

*LOCATION NOTICE:

1. *Effect of location notice pending complete location to protect the claim. Erhardt v. Boaro, 15, 472; Omar v. Soper, 15, 497*
2. *Erasing names and changing dates on notice. Omar v. Soper, 15, 497*

LODE.

1. *Part of lode detached becomes a distinct lode. Iron Silver M. Co. v. Murphy, 1, 548*
2. *Lode, or ledge, defined.*—A vein, lode or ledge, within the meaning of the act of Congress, is a mineral body of rock within defined boundaries in the general mass of the mountain. *Stevens v. Williams, 1, 566*
3. *Lode in place.*—A lode is in place when it is enclosed and embraced in the general mass of the mountain, and fixed and immovable in that position, and it is not material that the vein matter is loose and disintegrated. *Stevens v. Williams, 1, 557*
4. *Contact veins.*—If the deposits of ore are irregular along the line of contact of two kinds of rock, as porphyry and limestone, a lode can not be said to exist if the contact is barren of mineral or ore, for any considerable distance; but if there is a practically continuous body of ore, and no such interruption as exhibits other than a casual and fortuitous displacement, then it would be a lode. *Id.*
5. *Surface—Claim confined to single vein.*—The locator is confined to only a single vein, but a later party can not enter into his lines to prospect for a second vein. The locator is entitled to the surface, and the second vein must be proved to exist within the lines of the first before any later locator can enter between the boundaries of the first claim. *Atkins v. Hendree, 2, 328*
6. *Dips, spurs and angles.*—The use of the words "dips, spurs and angles," in a notice of location, clearly indicates that it is a lode which is claimed, and not a hill or surface location. *Weill v. Lucerne Co., 3, 372*
7. *Cross seam—Division of lodes.*—Where a spar seam is found crossing a deposit (considering the character of such seams in the district where Treasure Hill is situate as a matter of notoriety), it does not constitute a division between lodes, even where it is shown that

* The "Location Notice" is the notice posted on the claim and the "Location Certificate" is the recorded description of the claim. Especially in early records the recorded certificate is sometimes a duplicate of the notice on the ground but in general the posted notice is a short memorandum of the name, ownership, date, etc., of the claim while the recorded certificate contains a full description. From these facts it is obvious that the terms have been used somewhat interchangeably in the reported cases.

LODE. *Continued.*

the rock behind the spar seam contains but little ore. *Phillpotts v. Blasdel*, 4, 842

8. *Naming lode.*—Placing upon a lode a notice of location headed "Colfax Lode" is to christen it with that name. *Id.*

9. *A mass of ore underlying the debris* is not a lode such as may be followed on the dip beyond the surface lines, and the same is true where detached bodies of ore are found on the same "contact;" otherwise, if it be a continuous sheet of ore between defined boundaries of inclosing rock. *Leadville Co. v. Fitzgerald*, 4, 880

10. *Void for excess of width.*—Where a location, otherwise valid, exceeds the width allowed by law, it is void as to excess, but valid as to the extent allowed by law. *Jupiter Co. v. Bodie Co.*, 4, 411

11. *Length and width of lode claims.*—The act of May 10, 1872, authorizes a claim to be located 1,500 feet in length along the vein, and in the absence of any local rule or custom, the width of such claim may extend 300 feet on each side of the middle of the vein; but said act of Congress, by implication, authorizes the miners to limit the width of such claims. *Jupiter Co. v. Bodie Co.*, 4, 411; *North Noonday Co. v. Orient Co.*, 9, 529

12. *Definitions of vein or lode.* *Jupiter Co. v. Bodie Co.*, 4, 411; *North Noonday Co. v. Orient Co.*, 9, 529; *Eureka Co. v. Richmond Co.*, 9, 578

13. *Lode in place defined.* *Leadville M. Co. v. Fitzgerald*, 4, 880

14. *Recovery of the lode with surface.*—Where a miner locates a portion of the surface, and also a lode with its dips, angles and spurs, he may have his common law judgment for the surface, and judgment also for the lode following its course under other public lands. *Bullion Co. v. Croesus Co.*, 5, 255

15. *Outcropping lode.*—Where a ledge located as such comes to the surface, locator may recover the surface provided the outline of the ledge is visible on the surface. *Id.*

16. *Question as to whether lode or spur—Degree of proof necessary to support a theory.* *Silver M. Co. v. Fall*, 5, 283

17. *Evidence—Theory of veins.*—When the establishment of the plaintiff's case depends upon the establishment of a theory as to a vein formation, the correctness of the theory need not be established by any stronger proof than would be required for the case itself, i. e., by a preponderance of evidence. *Id.*

18. *Departure of vein from side lines.*—But when the vein has been proved to leave the lines of the location in fact, the location beyond such point of departure is defeasible, if not void, both as to the vein and the surface located. *Patterson v. Hitchcock*, 5, 544

19. *Right to follow unpatented vein into patented ground.*—The owner of a vein located prior to May 10, 1872, and who was in the possession thereof at such date, has the right to follow his vein within the patented surface ground of another. *Blake v. Butte M. Co.*, 9, 503

20. *Vein, lode or ledge defined—Existence of, a question of fact.* *Iron Silver M. Co. v. Cheeseman*, 9, 552

LODE. *Continued.*

21. *Continuity of ore body—Lode not "in place."*—If the ore body is continuous, to the extent that it may maintain that character, it is in place—whether deposited in that form, or moved to its position bodily with its inclosing walls. Whether the vein is thick or thin is not material, so it is continuous. But if the territory is so broken up, jumbled and mixed, the several parts together, that there is nothing continuous, there is no lode in place. *Id.*

22. *Scientific definition.*—The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineralized matter, or more accurately, as aggregations of mineral matter containing ores in fissures. *Eureka Co. v. Richmond Co.*, 9, 578

23. *Slide quartz from the ledge.*—The locator of a quartz lode is not confined simply to the solid quartz in place, but is entitled to the loose quartz rock and decomposed material containing gold, which was once a part of the lode, and is now detached, so far as the general formation of the ledge can be traced. *Brown v. '49 M. Co.*, 9, 600

24. *Idem.*—But this right could not be extended to cover free gold at a distance of several hundred feet, although such gold might be proved to have originally come from the ledge above. *Id.*

25. *Width of lode claim.*—The statute of Montana allowed to a locator "fifty feet on each side of said" lode for working purposes. *Held*, that the measurement of the width of the claim should be from the walls of the lode so as to make the width of the claim include the width of the lode, with fifty feet additional on each side. *Foots v. National M. Co.*, 9, 605

26. *Right to follow dip—Effect of end lines.* *Flagstaff M. Co. v. Tabet*, 9, 607

27. *In place—Superficial deposit—Dip.*—Ore, with no other covering than the superficial debris is not a lode in place, such as may be followed beyond the side lines of its location. *Tabor v. Dexter*, 9, 614

28. *Vein and lode defined.*—The "country" distinguished from the vein.—Metalliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries as to require recognition as a vein or lode (as in the *Eureka case*), but a broad metalliferous zone having within its limits true fissure veins plainly bounded, can not be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced. *Mount Diablo Co. v. Callison*, 9, 616

29. *A locator is entitled to the width prescribed by the district rule* for all lode claims, without specifying the number of feet in width in his location notice. *Id.*

30. *If it were held necessary to fix the width* in the notice, a claim in such notice for "all the privileges granted by the laws" of the mining district would fulfill the requirement. *Id.*

31. *Effect of end lines—Division line must be protracted to extend as far as the dip extends.* *Richmond Co. v. Eureka Co.*, 9, 634

32. *Quartz—Excludes placers.*—The word quartz, used in a deed of a mining claim, treated incidentally as descriptive of a lode claim, as

LODE. Continued.

distinguished from a placer or "surface mining" claim. *Kinney v. Consolidated Va. Co.*, 10, 459

33. *Side veins.*—Where a party owns a vein extending throughout his location, he may claim all other veins within the lines of such location. *Freeland v. Hoffman*, 13, 289

34. *Vein presumed to extend full length of claim.* *Armstrong v. Lower*, 15, 438

35. *In the case of cross-lodes the elder location takes all the mineral within the space of intersection—with right of way only, to the owner of the cross-vein.* *Pardee v. Murray*, 15, 515

36. *An impregnation, to the extent to which it may be traced as a body of ore, is a vein, lode or ledge, under section 2322, Rev. St. U. S.* *Hyman v. Wheeler*, 15, 519

37. *A body of mineral, or mineral-bearing rock, in the general mass of country rock, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be.* *Id.*

38. *With well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.* *Id.*

39. *Pocket in the country.*—If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode. *Id.*

40. *Mineralized stratum along planes of contact.*—Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities. *Id.*

41. *Identity of lodes—Persistence of ore as proof of.* *Id.*

42. *When veins unite on the dip the oldest location holds.* *Champion Co. v. Wyoming Co.*, 16, 145

43. *Meanderings of vein.*—Where the strike of the vein passes through the end lines of the location, the fact that between the end lines the out-crop is forced by the surface influences of slides and debris to meander so as to make slight variations from the general trend of the strike, does not prevent the side lines from being parallel with the vein; it is only necessary in such case that they should be substantially parallel. *Cheesman v. Hart*, 16, 268

LOST PAPERS.

1. *Insufficient proof of loss.*—Proof of the loss of a written instrument is not established by showing that of three persons who may have it, two are unable to find it; inquiry should be made of the third. *Patterson v. Keystone Co.*, 13, 171

2. *Party bound by statement of his witness that transfer was in writing.* *Id.*

LUNATIC.

1. *Contract approved for working lunatic's coal.* *Tabbart, ex parte*, 9, 643

LUNATIC. *Continued.*

2. *Agreement for benefit of lunatic affirmed in chancery—Lease of minerals for a gross sum treated as a sale and conversion of the realty. In re Mary Smith,* 9, 650

MALICIOUS PROSECUTION.

1. *Allegations in suit for.*—An action for malicious prosecution will not lie until the final termination of the suit, and the complaint should allege want of probable cause, by averring that the suit was finally determined in favor of the defendant therein. *Hall v. Fisher,* 12, 88

MANDAMUS.

1. *To compel an election.*—The omission to adopt such a by-law is no excuse for a failure to call the election, and the neglect for two months after the expiration of the first six months to call the election is a clear neglect of duty, the performance of which may be compelled by mandamus. *State v. Lady Bryan Co.,* 3, 526
2. *Neglect of one duty no excuse for neglect of another. Id.*
3. *Where an election is commanded by mandamus,* all preliminary matters incident to such election are by implication commanded by the writ to be done. *Id.*
4. *Petition for mandamus construed.*—A petition for mandamus is to be governed by the rules controlling the pleadings in an ordinary action, and in this case held not so defective as to warrant the refusal of the writ. *Id.*
5. *Expulsion of trustees no excuse for failure to elect board. Id.*
6. *Existence of collateral remedies will not prevent mandamus. Fremont v. Crippen,* 6, 221
7. *Remedy by appeal.*—The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal; but he can not have a mandamus to compel the issuance of attachment for contempt. *Fremont v. Merced Co.,* 9, 659
8. *Remedy at law.*—Mandamus is not the proper remedy where the relator has a plain, speedy and adequate remedy at law. *State v. Guerrero,* 9, 660
9. *Where relator claims that he is entitled to stock certificates* which the trustees refuse to issue to him, he has his action against the corporation for the value of the stock, and mandamus will not be allowed. *Id.*
10. *Where there are sundry claimants to stock,* a mandamus ought not to be granted to compel its issue to any one of them. *Id.*
11. *An order to stay waste is discretionary,* and will not be compelled by mandamus. *People v. The Circuit Judge,* 15, 142

MAPS.

1. *The necessity of maps in review of mining evidence, indicated. Van Valkenburg v. Huff,* 9, 467
2. *Parties—Act requiring map to be kept.*—Under the act making the county surveyor *ex officio* inspector of mines, and requiring him to make the plat of its workings in case the owner neglect so to do, and the county surveyor has the work done by deputy, the county

MAPS. Continued.

surveyor himself is the proper party to sue for the cost of making such map. *Daniel v. Hilgard*, 15, 280

8. *Sufficiency of map.*—In such case the defendant will not be heard to question the map as insufficient where it has been officially accepted as correct. *Id.*

4. *The court would be justified in discarding assignments of error based on testimony given with a map before the witness, to which he refers, when such map is not produced to the reviewing court.* *Upton v. Larkin*, 15, 404

MARRIED WOMEN.

1. *Separate estate of married woman—Notice to husband.*—In transactions relating to her separate estate a married woman is bound by notice to her husband only so far as he acts as her agent. *Chew v. Henrietta Co.*, 4, 68

2. *Estoppel against feme covert.*—The wife will be assumed to have consented when her knowledge is shown. *Harkness v. Burton*, 9, 318

3. *Husband signing wife's name without authority.* *Boyd v. Merriell*, 9, 664

4. *Parties omitted in suit against association.*—The name of a woman signed to articles of association without authority may properly be omitted in a suit against the members of the association for services. *Id.*

5. *Conveyance to married woman without consideration.*—Effect of making conveyance to and taking note from wife of a party, whose name is used without her having real ownership. *Bonesteel v. Bonesteel*, 9, 667

6. *Contract between husband and wife.*—A contract, in which a husband agrees to perform services for his wife and two other persons, and a judgment obtained thereon, are both void at common law as between husband and wife; and if such a contract is authorized by statute, the strict letter of the statute must be followed. *Isaacs v. McAndrew*, 9, 690

7. *Suit concerning wife's separate estate.*—In proceedings for an account of the proceeds of the wife's separate estate, the husband can not sue alone, without joining his wife in the bill. *Thompson v. Noble*, 11, 187

MASTER AND SERVANT.

1. *Master and servant liable as co-defendants.* *Wright v. Comp-ton*, 2, 189

2. *Municipal liability—Employer and contractor treated as master and servant.* *City of Tiffin v. McCormick*, 2, 194

3. *Set of instructions.*—Certain instructions defining the rights and liabilities of master and servant approved (see statement of case for the instructions). *Sowden v. Idaho Co.*, 2, 199

4. *Consideration of new risks arising after original employment.* *Id.*

5. *Mining company experimenting with giant powder.*—The plaintiff was not informed of the proper mode of using it, although the

MASTER AND SERVANT. *Continued.*

corporation had printed directions. The plaintiff being injured by an explosion, *held*, that the corporation was liable. *Smith v. Oxford Co.*, 2, 208

6. *Delivery to servant of assayer*, is delivery to the assayer, and trover lies after demand in such case. *Mead v. Hamond*, 9, 672

7. *No action lies against a steward*, manager or agent, for damage done by the negligence of those employed by him in the service of his principal. *Stone v. Cartwright*, 9, 673

8. *Master liable where he becomes a workman*. *Ashworth v. Stanwix*, 9, 674

9. *Negligence of owner acting as manager—Injury from falling scale*. *Mellors v. Shaw*, 9, 678

10. *Accident from scale—Negligence of underlooker*. *Hall v. Johnson*, 9, 684

11. *Injury to servant through negligence of master—Spliced rope*.—The condition of the rope could not be seen by ordinary observation. *Held*, that the use of the rope in its unsafe condition, was gross negligence in the employer, and that he must answer in damages for the consequences. *Perry v. Ricketts*, 9, 687

12. *Idem—Notice of defect by employe, when not required*.—It was not incumbent on the employe, under the circumstances, to notify his employer of the defect, which the former had but slight opportunity of knowing, and notice of which had already been given to the latter. *Id.*

13. *Contract for services—Time of payment*.—A written contract for five years' services as superintendent of mines, at the rate of \$4,000 per year, to be paid as part of the business expenses of the enterprise, in which no time of payment is fixed, is an entire contract, and performance of the work for the whole period is a condition precedent to the right to sue for the hire. *Isaacs v. McAndrew*, 9, 690

14. *Contract for superintendent's expenses construed*.—An agreement that the traveling and living expenses of the superintendent of a mine shall be a charge upon the business and property of the enterprise, creates no right on the part of the superintendent to proceed against his employers before an attempt is made to exhaust the remedy against the property itself. *Id.*

15. *Interest on money expended by superintendent* will only be allowed when it is averred and proved that there has been unreasonable and vexatious delay. *Id.*

16. *Quitting before expiration of year*.—The finding of a jury that a party has performed services as superintendent of mines in Montana for a year, under contract, will be set aside if the evidence shows that he left the Territory before the year expired. *Id.*

17. *Superintendent with full powers of hiring—Complaint insufficient*.—*Held*, that a demurrer to the complaint was properly sustained, because the complaint contained no averment that defendants were negligent in employing the superintendent. *Collier v. Steinhart*, 10, 1

18. *A servant takes upon himself the ordinary risks and perils of*

MASTER AND SERVANT. *Continued.*

the service in which he voluntarily engages. *Kielley v. Belcher Co.*, 10, 8; *Strahlendorf v. Rosenthal*, 10, 676; *Kielley v. Belcher Co.*, 10, 11

19. *Ordinary risks defined.*—The ordinary risks include all such as, arising out of the nature of the work, happen, notwithstanding the exercise of due care, and also those arising from the negligence of those of his fellow-servants who are engaged in the same department of the master's general business, and who are not his superiors in authority. *Kielley v. Belcher Co.*, 10, 8

20. *Fellow-servants in distinct departments.*—The rule which exempts the master from liability for injuries caused by one fellow-servant to another does not extend to the case of servants serving in distinct departments of the master's general business. *Id.*

21. *Negligence of fellow-servant.*—If an employe in a mine is injured by the negligence of his co-laborer in the same line of employment, there is no liability for the injury on the part of the employer. *Kielley v. Belcher Co.*, 10, 11; *Ardesco Co. v. Gilson*, 10, 669

22. *Who are fellow-servants in a mine.* *Kielley v. Belcher Co.*, 10, 11; *Lehigh Valley Co. v. Jones*, 10, 30

23. *A foreman in charge of hands is not a fellow, but a superior servant.* *Berea Stone Co. v. Kraft*, 10, 16

24. *When the foreman is for the moment discharging the duties of a laborer, his master is answerable for negligence arising from his acts as if he were a laborer.* *Id.*

25. *Negligence of fellow-servant—Liability of employer.*—By the Civil Code of California an employer is not bound to indemnify his employe for losses in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe. *McLean v. Blue Point Co.*, 10, 23

26. *Injury of inferior by superior.*—The code referred to recognizes no distinction growing out of the grades of employment of the respective employes; nor does it give any effect to the circumstances that the fellow-servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were in common engaged. *Id.*

27. *Miner held to the mine regulations after discharge while still in the pit.* *Higham v. Wright*, 10, 24

28. *Overseer and workman.*—The rule is the same, although the one injured may be an inferior in grade and subject to the control and direction of the superior whose act caused the injury, provided they were both co-operating to effect the same common object. *Lehigh Valley Co. v. Jones*, 10, 30

29. *A "mining boss" and a "driver boss" are fellow-servants.* *Lehigh Valley Co. v. Jones*, 10, 30. The same as to mining boss and miner. *Delaware Co. v. Carroll*, 10, 47

30. *Liability of company for negligence of contractor.* *Lake Superior Co. v. Erickson*, 10, 40

31. *Idem—Legal privity* may sometimes exist between one con-

MASTER AND SERVANT. *Continued.*

tracting party and the servants of the other; as where the servants are exposed to risk from being obliged to work upon the former's premises under an arrangement which binds him to keep the premises in safe condition. *Id.*

82. *Injury to contractor's employe.*—Where a mining company contracts for the removal of ore, but assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employes for injury in consequence of neglect of that duty. *Id.*

83. *Mining bosses appointed under statute are still fellow-servants.* *Delaware Co. v. Carroll,* 10, 47

84. *Risk of falling scales.*—A miner who knows, or by the exercise of ordinary care might have known, of the unsafe condition of a coal roof, and continues to work in the dangerous place without protest or complaint, and without being induced to believe that a change would be made, assumes the risk and can not recover in case of injury from falling scale. *Money v. Lower Vein Co.,* 10, 56

85. *Duty of master to inform servant of danger incident to occupation.* *McGowan v. La Plata Co.,* 10, 59

86. *The master is answerable for the conversion of a customer's property intrusted to his servant.* *Armory v. Delamirie,* 10, 66

87. *Right of selection of agent necessary to fix liability for his acts on the principal.* *Boswell v. Laird,* 10, 617

88. *Employer liable after acceptance of work.*—After the acceptance of the work of construction, by the person for whom it was built, he becomes liable for subsequent injuries, having thus assumed the responsibility of its sufficiency, and the liability of the contractor ceases. *Id.*

89. *Knowledge of habitual violation of rules.* *Senior v. Ward,* 10, 646

40. *Dangers known only to employer.*—The employer must warn the employe of, or be liable for injury thereby to the latter. *Strahendorf v. Rosenthal,* 10, 676

41. *Indefinite hiring.*—When one is employed as an agent, etc., for no definite time, it is a hiring at will of both parties, and he may be discharged without notice. *Kirk v. Hartman,* 11, 450

42. *Debt will lie on a contract for service for a fixed time and compensation, when the servant is prematurely dismissed.* *Id.*

43. *Mitigation of damages.*—In an action of debt upon a contract of hiring by a servant discharged before his term, his being engaged in other profitable business or refusing it if offered, may be shown by the defendant (on whom is the burden) in mitigation of damages. *Id.*

44. *Employes of corporation—When not fellow-servants.*—It is not law "that the defendant, being a corporation, and unable to act otherwise than by means of servants, all persons employed by it in the same general business must necessarily be fellow-servants, within the rule exempting the master from liability for the negligence of one servant to another." *Knareborough v. Belcher Co.,* 12, 155

45. *Construction favorable to employes.*—A penal act concerning the mode in which employes are to be paid, is to be construed as passed

MASTER AND SERVANT. Continued.

in the interest of the employe and not so as to qualify powers previously enjoyed by him unless such powers are being used by way of collusion to defeat the operation of the act. *Shaffer v. Union Co.*, 15, 59

46. *Safe place to work—Delegation of duty.*—An employer owes to his servant the duty of furnishing him a safe and proper place in which to pursue his work, so far as he is able to do so by the exercise of ordinary care and diligence; and this duty he can not delegate to an agent or servant, so as to excuse himself as to responsibility to one who has been injured by its non-performance. *Trihay v. Brooklyn Co.*, 15, 585

47. *Notice to foreman.*—It is no defense that the injury was occasioned by the negligence of a foreman, who had the entire charge of the mine, as notice to him was notice to the company. *Id.*

48. *An act intended to prevent a class of contracts found to constantly engender distrust* and suspicion of unfair dealing between master and miner can not be countervailed by special contracts made in disregard of its terms. *Bourne v. Netherseal Co.*, 15, 691
See NEGLIGENCE.

MEASURE OF DAMAGES.

A—IN GENERAL.

B—IN ACTIONS EX CONTRACTU.

C—IN ACTIONS EX DELICTO.

D—EXEMPLARY—EXCESSIVE.

E—INTEREST—NOMINAL.

F—LIQUIDATED.

G—DAMNUM ABSQUE INJURIA.

A. In General.

1. *General test.*—Damages ordinarily recoverable are those necessarily following the breach which the defaulting party might be presumed to know would result from his failure. *Pittsburg Co. v. Foster*, 10, 116

2. *Prospective damages* can not be obtained unless it appear that the party will be subjected to the specific loss for which he demands compensation. *De Costa v. Massachusetts Co.*, 10, 98

3. *Proximate cause of damage.*—The rule of damages in cases of fraud or breach of contract, is that they must be the natural or proximate consequence of the act complained of, and those results are proximate, which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract. *Crater v. Binninger*, 10, 124

4. *Remote profits.*—In applying the general rule that "the damage to be recovered must always be the natural and proximate consequence of the act complained of," those results are to be considered proximate, which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract. *Smith v. Bolles*, 16, 159

5. *Where the vendor avers his land cost a certain price* and that

MEASURE OF DAMAGES—In General. *Continued.*

the vendee may come into the venture at cost price, whereas in fact the original cost was less than represented, the vendee is entitled to damages to the extent of the difference. *Crater v. Binninger*, 10, 124

6. *Leaving the law to the jury.*—An instruction to the jury that they may "assess such damages as the evidence would warrant," without giving them any rule or standard, is not a mere omission, but a misdirection. *Gilmore v. Hunt*, 10, 134

7. *Vendee kept out of possession; mesne profits, the measure.* *Id.*

8. *Disregard of instructions as to measure of damages.*—The court should hold the jury to the strict rule as to the measure of damages with a firm hand, by setting aside the verdict whenever they disregard it. *Id.*

9. *Form of action immaterial—Complaint construed.*—It does not matter whether the complaint state facts which would amount to trover or to trespass, at common law. Complaint construed and held valid to support judgment for value of the ore in place, or value immediately after separation. *Waters v. Stevenson*, 10, 240

10. *Difference of price, when an insufficient measure.* *Scott v. Kittanning Co.*, 3, 159

11. *Scant salt supply of Confederate States*, caused by the blockade, considered as increasing the rental value of salines during that period. *Stuart v. White*, 5, 455

12. *Real and market value of mines.*—In ascertaining whether the price paid was inadequate, the inquiry must be restricted to the market value of the property at the time of sale. And this may be very different from its intrinsic value. This is peculiarly the case with a mine, the real value of which, at any given time, can only be ascertained when the mine has been exhausted. *Henry v. Everts*, 5, 603

13. *Prevention of mining, a destruction of value.*—When claims are valuable for mining only, the interruption of their use for such purpose, is to defeat the object of their original appropriation. *Logan v. Driscoll*, 6, 173

14. *Fraudulent sale of quarry—Measure of damages.* *Page v. Parker*, 6, 545

15. *The price paid the basis of the measure of damages.* *Id.*

16. *Rule of damages in warranty cases, when applicable.*—The rule of damages in cases of warranty, and in cases of fraud in the sale of property, is the same only when the warranty in the one case covers those qualities and properties of the article sold, and those only, concerning which the misrepresentations in the other case are material and fraudulent, as well as false. *Id.*

17. *Execution of bond—Recital.*—Where G. and N. executed a bond for an injunction, in which it is recited that G. had applied for the writ as the agent of H., but the bond was signed and sealed by G., without other reference to H.: *Held*, that the description of himself as agent, in the body of the instrument, did not exclude his personal liability. *Gear v. Shaw*, 7, 643

18. *Shares in a ditch company can have no peculiar value*, considered with reference to the ownership of property covered by the ditch,

MEASURE OF DAMAGES—In General. *Continued.*

beyond the purchasable value of such shares in the market. *Bowker v. Goodwin*, 10, 149

19. *Market value—Failure to deliver stock.*—The measure of damages in cases where there is a conversion of, or failure to deliver, a certain number of shares of stock having no peculiar value, is their market value, either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances. *Id.*

20. *Royalty recovered on coal not dug.*—The plaintiffs leased to the defendant the right to mine coal on their land, south of a disputed line, at a royalty of so much per bushel. The plaintiffs were permitted to recover, not only for the coal actually mined, but for what the defendant reasonably could, and should have mined upon the land leased; but for the quantity not mined, the measure of damages was the difference between the stipulated rate of compensation, and the value of the coal left unmined. *Lyon v. Miller*, 10, 85

21. *Sales at uncertain rates to acquaintances, insufficient to fix market value.* *Fitz v. Bynum*, 13, 612

22. *Lessee surrendering lease to third party to sink for coal, who fails to dig for same.* *Pell v. Shearman*, 10, 89

23. *The measure of damages in an action for waste water*, supplied defendant from plaintiff's coal shaft, in the absence of special contract fixing the price, is its value to defendant, or what it was reasonably worth. It is no answer to the action that the water was going to waste; nor where a protection wall and a tank for its reception were built, with the consent, but not at the request of the plaintiff, is it material to inquire what it would have cost to convey the water away by a drift. *Chicago Co. v. Northern Ill. Co.*, 15, 198

24. *Evicted lessee—Rent.* *Kille v. Ege*, 12, 654

B. In Actions Ex Contractu.

25. *Contract controls price.*—Where work is done under a special contract fixing the price to be paid, the contract will control the price whether it be reasonable or not. The contract must govern where it can be made to apply. *Brigham v. Hawley*, 2, 59

26. *Upon a contract to deliver coal at the plaintiffs' factory at a fixed price*, the measure of damages for delivering an inferior quality of coal is the difference in value, at the factory, of the coal called for in the contract and that actually delivered; and since the coal was to be transported at plaintiffs' expense, the measure of damages for a failure to deliver at the time called for in the contract, the plaintiffs having consented to receive it later, was the difference between the actual charge for freight and insurance and the average rates during the period covered by the contract. *Merrimack Co. v. Quintard*, 2, 846

27. *Measure of damages where there is no market.* *Hazleton Co. v. Buck Mt. Co.*, 2, 889

28. *Upon an uncompleted contract for running a tunnel*, the completion being prevented by reason of non-performance of conditions

MEASURE OF DAMAGES—In Actions Ex Contractu. *Continued.*

by defendant, the measure of damages is the contract price per foot for the actual number of feet run. *Monroe v. Northern Pacific Co.*,
2, 652

29. *Failure to deliver telegram—Measure of damages.*—The defendant will not be held liable for the special damages resulting from a delay in delivery or mistake in the message, but only for natural and ordinary damages, the special damages for the non-delivery of the message being too remote. *Baldwin v. U. S. Co.*, 3, 70

30. *Failure to deliver engine for transporting coal.*—Held, that evidence of the difference of cost of transportation between horse power and by the engine during the period of delay was admissible on the question of damages. *Pittsburg Co. v. Foster*, 10, 116

31. *On breach of contract to furnish furnace with daily supply of coke.* *Missouri Furnace Co. v. Cochran*, 10, 399

32. *Damages too remote.*—Evidence that the defendants could have moved and hauled more coal with the engine than with horses, to show the profits from the increase, was inadmissible, being too remote. *Pittsburg Co. v. Foster*, 10, 116

33. *Delivery of iron inferior to contract.*—Iron having been delivered under a contract, the vendor was notified that it was inferior and requested to take it away, which he neglected to do. The vendee had then the right to dispose of it or use it, and the vendor was entitled only to its actual market value. *Youghioghany Co. v. Smith*, 10, 139

34. *The measure of damages to the vendee to whom an inferior article has been delivered*, when he retains the article, is the difference between the value of the article and what a good article could be obtained for. *Id.*

35. *Breach of contract by vendor.*—General rule for the measure of damages, is the difference between the contract and market price at the time of the breach. *McHose v. Fulmer*, 10, 173

36. *When the article can not be obtained in the market*, the measure is the actual loss the vendee sustains. *Id.*

37. *Where vendee has in the meantime resold the article.*—McHose, a manufacturer, contracted for iron from Fulmer, who failed to comply, and McHose could not supply himself in the market. Held, that the measure of damage was the loss he sustained by having to use an inferior article in his manufacture, or in not receiving the advance on the contract price upon contracts he was to fill, relying on Fulmer's contract. *Id.*

38. *Contract to rescind stock sale.*—Held, that upon tender of the stock, and refusal to refund the price, the measure of damages was the price, with interest from date of tender. *Laubach v. Laubach*, 10, 177

39. *On refusal by vendee to accept goods sold him*, the measure of damages is the difference between the contract and the market price, at the time of refusal. *Id.*

40. *Where the contract is that the vendee may rescind the contract*, or the contract is rescinded by the vendee by reason of inherent vice, the measure of damages is the price paid, and interest. *Id.*

MEASURE OF DAMAGES—In Actions Ex Contractu. *Continued.*

41. *Complicated oil contract—Parol proof excluded—Sale by sample.* *Foot v. Marsh,* 10, 185
42. *On delivery under oil contract, short in measure and inferior in quality.* *Id.*
43. *Failure to deliver stock.*—Where there is no trust relation between the parties, and no obligation to deliver specific stock, the measure of damages for a failure to deliver stock, is the market value of the stock on the day it should have been delivered, with interest thereon to the time of trial. *Huntingdon Co. v. English,* 10, 288
44. *Defense affecting only the measure of damages.*—In an action for breach of covenant against incumbrances, based upon the fact that there was an outstanding coal privilege in the land, the answer set up that there was no coal in the land, and that the plaintiff had never been evicted, etc.: *Held,* that these matters could not defeat the plaintiff's right to recover, but related solely to the measure of damages. *Stambaugh v. Smith,* 15, 82
45. *Damages after suit brought.*—In an action for breach of covenant against incumbrances, money paid for a deed releasing certain incumbrances after suit brought may be recovered, and the deed may be introduced in evidence. *Id.*
46. *Condition of penal bond.*—Where the provision for the payment of a fixed sum on the breach of an agreement is found in the condition of a bond containing a larger penal sum, the presumption is that the sum named in the condition was not designed as a penalty. *Cotheal v. Talmage,* 12, 299
47. *Breach of useless contract.*—There may be a loss, in a legal sense, sustained by a party for a breach of a contract, though its performance might have injured his property—as if he should contract for a useless structure on his own land. *Chamberlain v. Parker,* 10, 144

C. In Actions Ex Delicto.

48. *Bona fide claimant liable only for value of ore in place.* *Ege v. Kille,* 10, 212
49. *The value of the ore in place is to be ascertained* by deducting the cost of mining, cleansing and delivering the ore in market, from its market value, thus delivered. *Id.*
50. *The measure of damages is the fair value of the coal in place and such injury to the land by mining.* *Forsyth v. Wells,* 14, 498
51. *In trespass, if it appears that the act of the defendant was not willful or grossly negligent, the measure of damages is the value of the coal at the mouth of the pit, less the cost of severing it and raising it.* *Austin v. Huntsville M. Co.,* 9, 115; *United Merthyr Co., In re,* 10, 153
52. *The value of the ore in place is the only just rule, where it is taken under bona fide claim of right.* *Clowser v. Joplin Co.,* 10, 222
53. *Damages where trespass is done under claim of right.*—Where there is fraud or negligence on the part of the defendant, the jury may give the value of the coals at the time they first became chattels; but where taken without fraud or negligence in the belief that he had a

MEASURE OF DAMAGES—In Actions Ex Delicto. *Continued.*

right to take them, they should give only the value of the coal in place.

Wood v. Morewood, 10, 77

54. *Measure of recovery in inadvertent trespass different from the measure in deliberate trespass.* *Trotter v. Maclean,* 10, 263

55. *Measure of damages in trespass—Royalty not deducted.*—In trespass for taking coals where the trespasser is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine owner on coals got from the mine. *Wüld v. Holt,* 12, 182; *Illinois Co. v. Ogle,* 10, 282, 10, 198; *McLean Co. v. Lennon,* 10, 277

56. *Value of the coal when first severed.*—The proper measure of damages is the value of the coal when it was first severed from the mine; if defendant has afterward removed the coal and brought it to the pit's mouth, plaintiff can not recover damages according to the increased value given to it by these operations, though he may have had no opportunity of claiming the coal before they were performed. *Morgan v. Powell,* 10, 79

57. *Defendant allowed cost of hoisting.*—The defendant, in trespass, must be allowed in damages for his expense and labor in removing the coal and bringing it to the pit's mouth, but not in first severing it from the mine. *Id.*

58. *Coal worked by mistake beyond boundary—Current royalty the measure of damages—Coal inaccessible to its owner.* *Livingstone v. Rawyards Co.,* 10, 291

59. *The measure of damages is the value of the coal in the bank after it is dug, or the value of the coal at the mouth of the pit less the cost of conveying it after dug, from the mine to the mouth of the pit.* *Robertson v. Jones,* 10, 190

60. *The plaintiff is not limited in his recovery to the value of the coal taken as it lay in the bed.* *Id.*

61. *Trover, after demand, for coal severed by trespasser.*—If one wrongfully take coal from the bank of another, the latter may, at any time after the taking, demand it, and upon refusal to deliver, might, it seems, in an action of trover, recover the value of the coal in its condition at the time of such demand. *Id.*

62. *Trover—Coal in the run—What expense deducted.*—*Held:* 1. That the measure of damages was the value of the coal at the mouth of the shaft, less the cost of carriage from the breast where broken, which is only another mode of expressing its value as it lay in the run where it was not salable. 2. That the conversion was complete at the moment of severance. 3. For the expense and trouble of sorting, defendant could not claim to be reimbursed, but for the cost of bringing it to the pit's mouth they should be allowed, because any person purchasing the coal in the pit would have deducted from the price such cost of carriage. *McLean Co. v. Long,* 10, 193

63. *The measure of damages is the same in trespass and trover, except where circumstances of aggravation are relied on in trespass.* *Id.*

MEASURE OF DAMAGES—In Actions Ex Delicto. *Continued.*

64. *It is the duty of owner of coal mine on approaching his terminals to make surveys to prevent encroachment on the adjoining land, and the least evidence of bad faith on his part would make every intentment in favor of the injured party. Coal Creek Co. v. Moses,* 15, 544

65. *Idem—Measure of damages, the value in place.*—But if such person is shown to have acted fairly, and the trespass is proved to have been unintentional and inadvertent, the measure of damages is the value of the coal *in situ* before the trespass, and the incidental injury, if any, to the land, by the taking or mode of taking. *Id.*

66. *Compensation only, the rule.*—The weight of recent authority, even in actions at law, where the trespass is inadvertent by one miner on the lands of another, is to limit the recovery to just compensation, and this rule is certainly not changed by bringing the suit in chancery. *Id.*

67. *Working across boundary.*—Where the defendant in working his coal mine broke through the barrier and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale: *Held*, in trespass for such working, that the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it. *Martin v. Porter,* 10, 74

68. *Review of authorities.*—The English and American precedents reviewed, and *Martin v. Porter* (10 M. R. 74) followed. *Barton Co. v. Cox,* 10, 157

69. *Lessee mining beyond bounds.*—Under a lease authorizing the defendant to mine coal on land *south* of a designated line, the lessors in covenant on the lease were not entitled to recover for coal mined *north* of the said line; and that the plaintiffs were in possession of the land north of the said line was not material. For coal mined *north* of the line the defendant may be liable in trespass. *Lyon v. Miller,* 10, 85

70. *Measure of damages against overstepping tenant.*—Decreed, that the defendants must account for all slate taken from outside of the demised lines since the date they had agreed to remove, at what it was worth at the date when taken from the quarry. *Sheldon v. Davey,* 8, 581

71. *Lessee passing bounds by mistake. Freck v. Locust Mountain Co.,* 9, 57

72. *Measure of damages against lessor mining the leased ground. Chamberlain v. Collinson,* 9, 87

73. *Lessee recovering full value against trespasser. Attersoll v. Stevens,* 10, 67

74. *Recovery by tenant against trespasser—Royalty not deducted.*—The right in the tenant of leased mines is absolute, and if a trespasser take his ore during term, the royalty which the tenant should pay the landlord is not to be deducted. *Waters v. Stevenson,* 10, 240

75. *Compensation only, the rule in tort.*—In actions sounding in tort, but not involving fraud (malice) or culpable negligence, the aim of the law is to award full compensation, but nothing beyond. *Id.*

MEASURE OF DAMAGES.—In Actions Ex Delicto. *Continued.*

76. *Review of the cases, English and American, on the question of deductions for cost of mining, in trespass for ore taken. Id.*

77. *Trespasser allowed cost of mining.*—A trespasser taking ore, in the absence of fraud or culpable negligence by overstepping boundaries, is entitled to deduction of the cost of mining the ore in question. *Id.*

78. *Ignorance of boundary no defense in trespass. Mays v. Yappan,* 10, 191

79. *The question whether the trespass was willful or was ignorantly done is immaterial when plaintiff is entitled to recover only the damages actually sustained. Id.*

80. *Value of the gold extracted, less cost of washing, allowed. Id.*

81. *Damages for coal rendered inaccessible. Franklin Co. v. McMillan,* 10, 224

82. *Damages for trespass on gold claim are the value of the gold less the expense of digging the goldbearing earth and separating it from the realty, so as to make it personal property. Goller v. Fett,* 11, 171

83. *Sluicing away bed-rock and reservoir.*—Damages allowed by the referee for the washing away of bed-rock by the plaintiff in sluice mining, which, from the facts found, were altogether hypothetical, were properly stricken out by the court below; but damages for the destruction of defendant's reservoir should have been allowed. *Jones v. Clark,* 11, 474

84. *Measure of damages in cases of negligence simply.*—The rule is to allow the actual damages, and it is error to instruct a jury that they may award smart money. *Moody v. McDonald,* 2, 187

85. *Ore leave, as basis of damages.*—A tenant of ore mines had under his title no means of obtaining his own share other than by taking at the same time the shares of his fellows. *Held,* that the value of the ore in place, ore leave, was the just basis of account in this case. *Coleman's Appeal,* 14, 223

86. *The rental value of the land is not a proper measure of damages in the case of trespass for taking ore. U. S. v. Magoon,* 10, 84

87. *Profits and expense of maintaining the plant while idle, as damages for trespass causing idleness. Douth v. Bird,* 14, 454

88. *Malice—Measure of damages.*—Where there is evidence that the trespass is malicious, a court should not be too stringent in excluding evidence as to damage, but should wait and instruct the jury as to the true rule to be given on the whole evidence. *Id.*

89. *Measure of damages for timber cut under claim of title.*—In an action of trespass for cutting timber on vacant land against a mining corporation, where it is proved that the defendant's agent, in good faith, believed it was the company's land, the verdict ought not to be for a sum greater than will "cover the injury shown by the proof to have been inflicted." *Yahoola River Co. v. Irby,* 14, 460

90. *"Highest market price" not true rule of damages. Boylan v. Huguet,* 14, 503

91. *Mining and carriage across boundary—Way-leave allowed.—*

MEASURE OF DAMAGES—In Actions *Ex BrHeld*. *Continued*.

The owners of a colliery worked across their line and extracted coal from adjoining lands and carried coal, to some extent, from mines of their own, through the workings under the land trespassed on. Upon bill for an account: *Held*, that the owner was entitled to the value of the coal gotten under his land, with an allowance for raising but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the defendants from their own land and carried under plaintiff's land. *Phillips v. Homfray*, 14, 678

92. *Value without deducting cost of getting*, taken to be the rule in admitting damages, there having been a taking with knowledge. *Ecclesiastical Com'rs v. N. E. Ry. Co.*, 12, 609

93. *No deduction for expenses in favor of the fraud of co-tenant*.—Co-lessees with plaintiff, an absent owner in the lease, struck oil, shut down the well and advertised it a failure. They then, through a stranger secretly purchased plaintiff's interest for less than he had paid for it, whereupon they resumed work and pumped largely: *Held*, that the fraud being proved, plaintiff was entitled to his share of the gross receipts for oil without any allowance for expenses. *Foster v. Weaver*, 15, 551

94. *Conversion of ore*.—Value at the mine adopted as the proper measure. *Aurora Hill Co. v. 85 Mining Co.*, 15, 581

95. *Coal taken inadvertently*.—*Held*, that he was to pay only the fair value of such coal as if he had purchased the mine from the plaintiff. *Hilton v. Woods*, 10, 110

96. *Injury to coal left standing*.—In trespass for breaking and entering plaintiff's coal lands he is entitled to recover its worth per ton in its native bed for all such coal as defendants, by their acts, have rendered impossible of removal; and for coal which may be still won, but at greater expense on account of defendants' acts, he is entitled to recover what the evidence may show to be the depreciation in value of such coal. *Barton Co. v. Coa*, 10, 157

97. *No deduction of expenses*.—In trespass for coal mined and taken the proper estimate of damages is its value, after it is severed and before removal, with the expense of severance. If defendants knew that the land was not their own, exemplary damages are allowed. *Id.*

98. *Animus—Where immaterial*.—Where the claim of the plaintiff is only for compensatory damages, and not founded on the *animus*, but on the acts of the defendant, it is not material whether or not the defendant knew the extent of the injury he was committing. *Wheatley v. Chrisman*, 11, 24

99. *Recovery after severance, by surface owner against trespasser*. *Stratton v. Lyons*, 10, 314

100. *Improvements as compensation for use of premises*.—The action for mesne profits is an equitable one, and hence a *bona fide* occupant, under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises. *Ege v. Kille*, 10, 212

101. *Fraudulent sale of interest in oil speculation—Deducting*

MEASURE OF DAMAGES--In Actions Ex Delicto. *Continued.*

value of interest retained by plaintiff.—The defendant, by false representations, induced the plaintiff to enter into an oil speculation and to take a one-eighth interest at a price much above the original cost of the land. The speculation was a failure: *Held*, that ordinarily the measure of damages would be the entire loss sustained by the plaintiff in the transaction into which he was inveigled, less the value of the interest which the plaintiff still held in the land. *Crater v. Binninger*,

10, 124

102. *Moneys advanced for purchase.*—When a defendant is fraudulently led into a losing speculation, moneys put into the scheme and lost in the ordinary course of the adventure may be considered as proximate and recoverable damages. *Id.*

108. *Digging ditch across another's land.*—In an action against defendant for digging a ditch across plaintiff's land praying damages, and also to have the ditch declared a nuisance, and abated: *Held*, that the plaintiff could not recover beyond the injury sustained; that as the cost of filling up the ditch might exceed the injury resulting from leaving it open, such cost of filling was not a proper measure of damages. *DeCosta v. Massachusetts Co.*,

10, 93

104. *Measure of damages for converting securities.*—The measure of damages in trover for conversion of a note (or agreement to pay money) is the amount of plaintiff's interest in the same. *Penniman v. Winner*,

2, 449

105. *Damage from mining above ditch head.*—A miner who works his claim above the head of a ditch previously located, so as to mingle mud and sediment with the water, and thus injures it for the use to which the ditch owner has applied it, or so as to fill up the ditch and reservoirs, thus lessening their capacity and increasing the expense of cleaning them, is liable for the damages thereby occasioned. *Hill v. Smith*,

4, 597

106. *Special injury to water used by hydraulic*, on account of sediment, considered as an element of damage, in action for filling ditch with debris. *Id.*

107. *Idem*—Reasonable care no excuse. *Id.*

108. *Liability of ditch owner for overflow*—Joint tort-feasors. *Richardson v. Kier*,

4, 618

109. *Measure of damages for conversion of stock.*—The measure of damages in trover, for the conversion of mining stock, is its market value; but in the statutory action of claim and delivery of personal property, in case return be not made, the value at time of trial with the addition of dividends since conversion, is the only complete remedy. *Bercich v. Marye*,

13, 544

110. *The measure of damages is the value of stock at date of decree*, where the wrong complained of is a case of mistake, and not the act of a willful wrongdoer. *Smith v. North Am. M. Co.*,

13, 599

111. *Rule of damages dependent on form of action.* *Maye v. Yappen*,

10, 101

112. *Dump deposits*—Damages limited to value of land. *Hartley v. Sides Co.*,

10, 207

MEASURE OF DAMAGES—In Actions Ex Delicto. *Continued.*

113. *Approximation of values.*—Held, that the proof furnished sufficient data to enable the jury to approximate the value of the ingots; by taking the cost of converting them into steel, from the market value of merchantable steel. *Mreker v. Chicago Steel Co.*, 10, 202

114. *Diversion of stream used to wash ore.*—The measure of damages for the diversion of a stream, whereby a farm with an ore bank thereon is injured, is the difference in the market value of the property as a farm and ore bank, immediately before the diversion of the stream, and immediately afterward as affected thereby, without reference to the fact that the water of the stream was formerly used, or might hereafter be required for use in washing the ore obtained from the ore bank. *Hanover Co. v. Ashland Co.*, 10, 204

115. *Mental suffering as element of damage.*—It is improper to allow compensation for mental suffering as a distinct element of damages in a suit for physical injuries. *Joch v. Dankwardt*, 10, 691

D. Exemplary—Excessive.

116. *In libel, if there is no proof of malice* or ill will toward plaintiff, and the publication is made in the usual course of defendant's business as public journalist, in the full belief that the article was true, after a careful inquiry from an apparently reliable source, the plaintiff is not entitled to punitive damages. *Wilson v. Fitch*, 9, 156

117. *Fixed by jury.*—The verdict will not be set aside for "excessive damages" when it is not apparent that the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence. *McGowan v. La Plata Co.*, 10, 60

118. *Evidence controlled by but one party, and he producing it not,* the strongest measure of damage is to be presumed against him. *Armory v. Delamirie*, 10, 66

119. *Digging lead ore on U. S. land.*—In trespass for digging and carrying away lead ore from lands of the United States, they are not entitled to recover, as damages, the value of the ore after it is dug. The injury done the soil is the gist of the action; and ore extracted must be considered an aggravation of the damages. *U. S. v. Magoon*, 10, 84

120. *Defendant trespassers, refusing to disclose the amount taken,* are themselves to blame if the jury return too large a verdict of damages. *Antoine Co. v. Ridge Co.*, 10, 97

121. *Cost of digging—Exemplary damages for trespass.*—In an action of damages for mining and carrying away coal, the measure of damages is the value of the coal when first severed from the bed, allowing nothing for the expense of digging, and if the trespass was not unintentional, exemplary damages may be added. (ROBINSON, J., dissenting as to non-allowance of expenses.) *Franklin Co. v. McMillan*, 10, 224

122. *Punitive damages for willful overstepping of boundaries.*—Where one engaged in mining and removing coal from his own land, crosses the line and proceeds to mine and remove coal from the land of another, not by mere mistake, but knowingly and willfully, in an

MEASURE OF DAMAGES—Exemplary—Excessive. *Continued.*

action of trespass by the owner of the land so intruded upon, the jury will be warranted in giving punitive damages. (SCOTT, J., dissenting.) *Illinois R. R. Co. v. Ogle*, 10, 283

E. Interest—Nominal.

123. *The rule of damages on breach of covenant for seizen is, generally, the consideration money, with interest, if the grantee has taken nothing by his deed; but if by subsequent conveyance the title is perfected in the grantee, he can recover but nominal damages.* *Hartford Co. v. Miller*, 3, 353

124. *Breach of contract of lessee to sink oil well.—Held, that under the lease, the well, if dug, would have been P.'s, and the product his; and that C. could only recover nominal damages for the breach, and not what it would cost to sink such a well.* *Chamberlain v. Parker*, 10, 144

125. *Where the next of kin are collateral relatives of the deceased, who have not been receiving from him pecuniary assistance, and are not now in a situation to require it, only nominal damages can be given; but where they were dependent on the deceased for support, they are entitled to compensatory damages without regard, in either case, to the distance of the relationship.* *Quincy Co. v. Hood*, 12, 148

126. *Dependency on deceased for support.—In the case of collateral kindred it will be admissible for the defendant to controvert the fact of dependency upon the deceased for support; and in case of a father as the next of kin, to show that he was not entitled to the services of his minor child, in reduction of the damages.* *Id.*

127. *Contractor interfered with by owner.—In trespass by a contractor under obligations to produce a certain output of ore, against the owner, for opening a new mine or shaft, it is error to instruct the jury that the proper measure of damages was such profits as the plaintiff would have realized by raising the ore which was raised by the defendant, at the rate per ton which the plaintiff was entitled to receive under his contract.* *Shaw v. Wallace*, 14, 421

128. *Idem—Nominal damages.—Unless the acts of defendant interfered with the beneficial working of plaintiff's mine, they were entitled to nominal damages only.* *Id.*

F. Liquidated.

129. *Distinction between penalty and liquidated damages.* *Wolf Creek Co. v. Schultz*, 3, 95

130. *Penalty—Liquidated damages.—The law prefers to treat a sum payable as a penalty rather than as liquidated damages, because then it may be apportioned to the actual loss.* *Bell v. Truit*, 8, 449

G. Damnum Absque Injuria.

131. *The erection of a dam so as to flood junior claims above, held to be damnum absque injuria.* *Stone v. Bumpus*, 4, 278

132. *Watermen and miners.—The notion that, as between ditch owners and miners using the water of a stream in the mineral regions*

MEASURE OF DAMAGES—*Damnum Absque Injuria*. *Continued.*

of the State for mining purposes, the law tolerates and winks at some uncertain and indeterminate amount of injury by the one to the prior rights of the other, is without any substantial foundation. *Hill v. Smith*, 4, 897

MECHANIC'S LIEN.

1. *Supplementary statute falls with repeal of original act.* *Ellison v. Jackson Co.*, 4, 559
See LIEN.

MERGER.

1. *Intermediate vested estate.*—Merger never takes place when it would have the effect to destroy the intermediate *vested* estates in third persons. *Logan v. Green*, 10, 823

2. *Second lease of term already let.*—When there is an outstanding lease and the reversioner makes a new lease to third persons, to commence immediately, this is a vested estate; and although the lessees could not take possession of their term, inasmuch as the possession belonged to the first lessee, they would have a *concurrent* lease, and be entitled to all the rents issuing out of the term of the first lessee, and on the expiration of that term they could legally enter and possess the land for the residue of their own term. This estate would prevent a merger when the first lessee became entitled to the possession. *Id.*

3. *Idem*—*Purchase of reversion by termor lets in intermediate lease.* *Id.*

4. *Merger of lien by assignment of stock.*—Where the holder of a lien upon stock became owner by assignment from the debtor, thus holding both the lien and the title to the security, the lien merged in the higher right, and as to the third parties he must be regarded as absolute owner. *Strout v. Natoma Co.*, 10, 830

5. *A note is not merged in an agreement which does not defeat a right of action thereon.* *Creighton v. Vanderlip*, 7, 172

MEXICAN GRANT.

1. *Notice of official survey unnecessary and its secrecy is unimportant.* *Boggs v. Merced Co.*, 10, 884

2. *Difference between official and private survey—Fraud.* *Id.*

3. *Confirmed by U. S. patent carries the minerals.* *Ah He v. Crippen*, 10, 867; *Moore v. Smau*, 12, 418

4. *Does not include mines of gold and silver.* *Moore v. Smau*, 12, 418

5. *Cession by Mexico of Mariposa tract included mines.* *Id.*

MILL SITE.

1. *Mill and mill privileges—Transfer of possession.*—Right to water acquired by appropriation may be transferred like other property, and the transfer of a mill carries its water privileges. *McDonald v. Bear River Co.*, 1, 626

2. *Water—Use for mill purposes.*—The interest in water acquired by one who locates on the bank of a stream and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location, and to

MILL SITE. Continued.

the flow of the water in its natural course above. *McDonald v. Askeu*,
1, 660

3. *Sale of water by mill owner.*—A person who has built a mill on a stream and appropriated a part of its water to propel machinery, does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above. *Id.*

4. *Insufficient location of water right by posting notice without user.*
Robinson v. Imperial Co., 10, 370

5. *Location of mill site, not incident to ditch location.*—A notice of appropriation of a right of way for a water ditch is not a notice of the appropriation of the land upon the sides of it, nor of a mill site in connection with it. *Id.*

6. *Appropriation of water.*—The location of a mill site is not an appropriation of water for purposes of the mill site. *Id.*

MINERALS.

1. *Coke, construed as the "produce of a mine."* *Bowes v. Ravensworth*, 2, 352

2. *The term "minerals" embraces everything not of the mere surface used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils are comprehended within it.* *Griffin v. Fellows*, 8, 657

3. *Minerals defined—"Stratum of stone"—"Fossils."* *Rosse v. Wainman*, 10, 388

4. *The word minerals limited to the product of mines, excluding the product of quarries.* *Darvill v. Roper*, 10, 403

5. *Minerals defined by the mode of getting—Freestone.*—In a conveyance the grantor reserved all "mines or seams of coal and other mines, metals or minerals," with liberty to get the same, etc. *Held*, that the term minerals included freestone but that the grantor had liberty to get the freestone only by underground mining and not by working in an open quarry. *Bell v. Wilson*, 10, 415

6. *Minerals must exist in available quantity in order that the land be classed as "mineral lands."* *Alford v. Barnum*, 10, 423

7. *Estate in minerals, a fee simple and partible.* *Canfield v. Ford*, 11, 201

8. *Title in U. S.*—It is a conceded doctrine that mines of precious metals "belong to the eminent domain of the political sovereignty." *Gold Hill Co. v. Ish*, 11, 635

9. *Sulphur—Similar produce.*—Whether sulphur was a "similar product" under a contract based particularly upon the expectation of finding petroleum—not decided. *Escoubas v. Louisiana Co.*, 12, 344

10. *Where the land was known to contain minerals of some character* although the proper name and real value were unknown to the parties, a reservation of "all" minerals, although used in connection with a particular mineral, *held* to be an unqualified exception of all minerals in the reservation in contention. *Gibson v. Tyson*, 13, 72

11. *All ores, treated as all "known" ores.* *Shoenberger v. Lynn*, 13, 88

MINERALS. Continued.

12. *Minerals in place are parcel of the freehold* and may form a separate corporeal hereditament which is the subject of a distinct inheritance. *Williams v. Gibson*, 16, 243

13. *It is only when minerals are severed from the soil* that they become personal chattels. *Id.*

MINERAL LANDS.

1. *U. S. railroad reservations—Quicksilver.*—The court assumes, the contrary not being alleged, that lands containing cinnabar or quicksilver, are mineral lands within the meaning of the act of Congress granting lands to the Western Pacific Railroad Co. *McLaughlin v. Powell*, 10, 424

2. *A railroad grant patent is admissible in evidence without first proving that the land is not mineral.* *Id.*

3. *Reservation of mineral in U. S. grant.*—In ejectment against a defendant in possession of a portion of land described in a railroad patent, which reserves mineral lands, the defendant is entitled to show that the demanded premises are mineral lands, and therefore not parcel of the grant. *Id.*

4. *A patent which excepts from the transfer "all mineral lands, should any be found to exist in the tract described," does not convey lands which are mineral.* *Id.*

5. *The returns of the surveyor are not conclusive as to the mineral character of lands.* *Gold Hill Co. v. Ish*, 11, 635

6. *Mineral lands included in grant for school purposes.*—The act of Congress of March 8, 1853, which granted to the State of California the sixteenth and thirty-sixth sections of public lands for school purposes, was designed to and did include mineral lands. *Higgins v. Houghton*, 13, 195

MINERAL SPRINGS.

1. *Receiver appointed to bottle the water—Receiver appointed on bill praying injunction.* *Whitney v. Buckman*, 10, 428

MINES.

1. *Mines are land.*—The mineral right, after severance from the surface title, is land. *Caldwell v. Copeland*, 1, 189

2. *California precedents.*—The decisions of the Supreme Court of California, referred to as establishing a system of common law upon the questions peculiar to the occupation of the mineral lands upon the public domain. *Mallett v. Uncle Sam Co.*, 1, 18

3. *The common law doctrine that he who possesses the surface owns to the center of the earth, is greatly modified.* One party may be entitled to occupy the surface, and another the mineral veins running under the same land. *Bullion Co. v. Croesus Co.*, 5, 255

4. *Mine unopened is no mine.*—A mine is not properly so called till it is opened; it is but a vein before. *Astry v. Ballard*, 8, 816

5. *Underlying seams constitute a single mine.* *Spencer v. Scurr*, 10, 888

6. *Expressio unius—Poor rate.*—The express mention of coal mines in the statute, 43 Eliz., is a virtual exclusion of all other mines, and

MINES. *Continued.*

therefore other mines are not ratable to the relief of the poor. *Rex v. Sedgley*, 10, 390

7. *Distinction between mine and quarry.*—Whether an excavation be a mine or a quarry is a question of fact; a stone working, where the stone is won by sinking the shafts perpendicularly to the stratum which lies considerably below the surface, and the stratum is worked by roads and gate heads, and the stone raised to the surface by machinery, or carried underground to a tunnel, in the same way as coal and iron ore are usually got, is a stone mine. *Id.*

8. *The word "mine" defined.*—The term "mine," when applied to coal, is equivalent to a worked vein, and if it be worked, a tenant for life may pursue it to the boundaries of the tract. *Westmoreland Co.'s App.*, 10, 394

9. *Coal vein underlying different tracts—Waste by life tenant.*—Where there are two different tracts, separated by an intervening tract owned by another, with a vein extending beneath them, the opening on one tract does not extend to the other, and the tenant for life mining under the unopened one is guilty of waste. *Id.*

10. *The distinction between a mine and a quarry* is that in a quarry the surface is removed, but in mining the beginning only is on the surface and a roof is left overhead. *Darvill v. Roper*, 10, 406

11. *The word mines* implies underground workings. *Bell v. Wilson*, 10, 415

12. *Parol evidence.*—The terms of a reservation in a conveyance are not to be limited by what was ordinarily gotten by a miner in the particular county at the time of the execution of the deed. *Id.*

13. *Corporeal hereditament.*—An estate in mines is a corporeal hereditament. *Canfield v. Ford*, 11, 201

14. *Lands, tenements and hereditaments, defined.* *Id.*

15. *Royal mines—Various nations.* *Moore v. Smau*, 12, 418

16. *Conveyance of royal mines in Mexico.*—Under Mexican law the interest in the royal minerals was conveyed under the mining ordinances by registry of discovery in case of new mines, and by denouncement in case of abandoned mines. *Id.*

17. *Contractor opening new mines.*—A contract by which a party is authorized to raise ore out of the mines on a designated tract, at a stipulated price, confers no authority to open new mines or to sink new shafts or slopes, except so far as such shafts or slopes may be necessary to the proper and successful working of the mines already opened. *Shaw v. Wallace*, 14, 420

18. *Mines not implied, where specially mentioned* in contract relating to the land. *Id.*

19. *Opened and unopened mines.*—If a lease of land be made for life, or for years, in part of which there is a mine open, the lessee may dig it. If the mine was not open at the time of the lease made, the lessee can not open it. *Saunders's case*, 15, 109

20. *Mines mentioned.*—If a man hath mines hid within his land, and leases his land and all mines therein, the lessee may dig for them. *Id.*

MINES. Continued.

21. *Veins and mines.*—The extent of the meaning of the word "mines," and its identity with "veins," discussed by counsel, with collation of the authorities. *Crouch v. Puryear*, 15, 118
22. *Dormant mine.*—It is a question of degree, to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not. *Legge v. Legge*, 15, 180
23. *New openings to old mine or quarry.*—Where a mine or quarry is once open the sinking of a new pit on the same vein, or the breaking of ground in a new place in the same rock is not the opening of a new mine or a new quarry. *Elias v. Snowden Co.*, 15, 143

MINING CLAIM.

1. *An unpatented mining claim is real estate.* *Rossville Alta Co. v. Iowa Gulch Co.*, 16, 93
2. *The word "claim" as used in the mining acts, is used to refer to a title not yet perfected by patent.* *Iron Co. v. Campbell*, 16, 218
3. *Effect of crossing survey.*—The fact that a location is cut by another valid claim crossing it obliquely does not make the line of such intersection the end line of the location when the location extends beyond the intersecting claim. *Cheesman v. Hart*, 16, 268

MISTAKE.

1. *Tunnel to be completed by date certain.*—Syllabus recites facts showing mistake or misrepresentation as to estimated length of tunnel. *Verzan v. McGregor*, 2, 565
2. *Misdescription of ore vein—Injunction against suit on warranty, pending reformation.* *Wilcox v. Lucas*, 3, 380
3. *Reformation of mistake in reservation—"Mines" includes more than "minerals."* *Hartford Co. v. Miller*, 3, 353
4. *Mistake in equity, may be shown affirmatively as by bill, or as a defense, and may be proved by parol testimony.* *Roosevelt v. Dale*, 6, 378
5. *Mistake vacates settlement.* *Perry v. Attwood*, 8, 441
6. *Necessity of mistake to be mutual.*—Lessees supposed they were getting under their lease the exclusive right to the premises for all purposes. Lessors signed under the belief that it gave the right to quarry only. *Held*, no ground for correction by a court of equity, the mistake not being mutual. *Brainerd v. Arnold*, 8, 478
7. *Mistake no ground for cancellation of contract, but for reforming it according to the truth.* *Id.*
8. *Mutual mistake as to existence of veins.*—If the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he can not have relief in an action in affirmance of it. He can not recover for his outlays in seeking for the supposed veins. *Harlan v. Lehigh Co.*, 8, 497
9. *Secured claim in bankruptcy.*—When a creditor, in ignorance of his rights, has proved a secured claim as unsecured, he will be allowed to amend by setting up his security. *In re Hope M. Co.*, 9, 364
10. *Effect of mistake of recorder—Acts of location operate as notice.* *Myers v. Spooner*, 9, 520

MISTAKE. *Continued.*

11. *Ores erroneously included in mortgage.*—Held, that although the mortgagee obtained his lien on the ores by the mistake of the scrivener, there was no reason why he should be compelled to relinquish his security until his debt was paid. *Ames v. New Jersey Co.*, 10, 484; *New Jersey Co. v. Ames*, 10, 486

12. *Equity will correct a clear mistake* in a written agreement so as to conform it to the understanding of the parties at the time of its execution. *Firmstone v. De Camp*, 10, 439

13. *Equity will reform a contract for sale of ore* so as to import that the ore forming the subject of sale shall come from the mine intended by the parties at the time of the execution of the contract instead of from the mine therein described by mistake. *Id.*

14. *Relief in equity from mistake.*—A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Grymes v. Sanders*, 10, 445

15. *Mistake arising from negligence* is not available in equity if the negligence rose from inexcusable ignorance. The party complaining must have exercised at least the degree of diligence which may fairly be expected from a reasonable person. *Id.*

16. *Relief in equity from mistake in lease*—Oil well not on the land demised. *Mays v. Dwight*, 10, 458

17. *Mistake cured by estoppel.*—Where parties had acted upon a certain decree, which was in fact void, whereby twenty feet on the Comstock lode had been set off as the property of the plaintiff, and another, and defendant had purchased such twenty feet from the plaintiff, both parties treating the decree as valid, the plaintiff having received his price, and the defendant having, by its expenditures, greatly increased the value of the property, there is no such mistake as a court of equity will correct. Equity will act upon the same hypothesis on which the parties have acted. *Kinney v. Cons. Va. Co.*, 10, 457

18. *Mistake cured by counter-mistake.* *Id.*

19. *Unstamped conveyance should be reformed, not canceled*—Purchase pendente lite—Possession—Notice.—Syllabus states facts at length, the court refusing reformation for want of equity in the plaintiff, on account of his laches, and because the intervening bonanza should go of right to those who found it. *Id.*

20. *To reform deed*—The alleged mistake must be proved beyond reasonable doubt. *Stockbridge Co. v. Hudson Co.*, 13, 120

21. *Mutual mistake.*—Where a contract is entered into upon an assumption by the parties of the existence of a certain fact, as to which it afterward appears that the parties were mutually mistaken, the contract obligation ceases. *Muhlenberg v. Henning*, 15, 423

MORTGAGE.

1. *Assignee of mortgage distinguished from purchaser without notice.* *Cumberland Co. v. Parish*, 1, 423

MORTGAGE. *Continued.*

2. *In a suit to foreclose a mortgage*, in which other lien claimants are parties, it is the duty of the court to determine the relative rights of all the parties. *Johnson v. Badger Co.*, 3, 386

3. *Probate sale of mortgaged property.*—The Probate Court has no power to foreclose a mortgage, and sales of mortgaged property made under its orders, pass only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired; the purchaser at such sale can not take by relation the title which the decedent had at the date of the mortgage. *Meyers v. Farquharson*, 3, 487

4. *Statute of limitations.*—An action to foreclose a mortgage, no written obligation to pay the money secured by it having been executed, is nevertheless, an action founded upon an instrument of writing, and is not barred until four years after the cause of action accrues. *Union Co. v. Murphy's Flat Co.*, 3, 487

5. *Purchaser at foreclosure where company refuses or is unable to redeem.*—Where the company is insolvent, or unwilling to pay or redeem after opportunity offered to all the stockholders to make such advances and save the property, a sale under the security in such case is valid. *Harts v. Brown*, 4, 1

6. *Duplicate deed of trust—Ratification unnecessary.*—A deed of trust having been executed by authority of the directors, and lost in transmission, a duplicate was executed. *Held*, that the duplicate was valid, and no ratification necessary. *Bassett v. Monte Christo Co.*, 4, 108

7. *Trust deed by corporation with director as trustee.*—In a suit against a corporation to foreclose a trust deed, the stockholders can not object to the validity of the deed, because the trustee therein named is also a director in the corporation. *Id.*

8. *Fixtures feed the mortgage.* *Roberts v. Dauphin Bank*, 6, 54

9. *Action on the case by mortgagee for removal.*—Where the mortgagor is insolvent, and a second mortgage has been injured by the removal of the fixtures, he may maintain an action on the case against the parties removing the property. *Id.*

10. *Mortgagee in possession—Tender.*—If plaintiff be a mortgagor, and the defendant a mortgagee who alleges there is still a subsisting claim against the property, though an injunction may be granted to stay a wanton or improvident waste by the mortgagee in possession, yet the plaintiff must, before he entitles himself to relief, bring into court the amount due, or offer to do so. *Irwin v. Davidson*, 7, 237

11. *Mortgagor may continue mining.* *Capner v. Flemington Co.*, 7, 264

12. *Irregularities on execution sale, waived by delay.*—A sale made at four o'clock in the forenoon does not conform to the statute, and renders the sale voidable, and so also does a sale of property *en masse*, where it was susceptible of division; but by unreasonable delay amounting to laches, the debtor loses the right to have the sale set aside. *Rigney v. Small*, 8, 217

13. *Outstanding mortgage will not defeat ejectment.* *Burr v. Spencer*, 8, 450

MORTGAGE. *Continued.*

14. *Miner's lien and intervening mortgage.*—Where a miner has been hired for a month and continues to labor under the original hiring from month to month, his lien is subservient to an intervening mortgage from the end of the current month during which the mortgage was filed for record. *Capron v. Strout*. 9, 391

15. *Defendant debtors seeking equity* at the hands of the court must do equity; viz., they must pay the money honestly due the complainants. *New Jersey Co. v. Ames*, 10, 437

16. *Account against mortgagor and his co-tenants.*—Mortgagee of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the other tenants in common. *Bentley v. Bates*, 10, 325

17. *Dissolution need not be prayed for.*—On a bill for an account of the dealings and transactions of a mining partnership. *Id.*

18. *Mortgagee can not open mines.* *Thorneycroft v. Crockett*, 10, 539

19. *Deed proved mortgage, by parol.* *Blackwell v. Overby*, 10, 581

20. *Application of the rule to the facts.* *Id.*

21. *Dissolving injunction on denial of bill.*—Mortgagor of quarry may work.—Injunction against a mortgagor restraining him from quarrying on a quarry lot, half of which had been conveyed as such to him by the mortgagee, and to secure the consideration for which conveyance the mortgage was given—dissolved on answer denying the charges in the bill, which charges intimated that the defendant was impairing the value of the mortgaged premises and endangering the security. *Vervalen v. Older*, 10, 540

22. *Extrinsic evidence to explain deed.*—Every material fact that will enable the court to identify the person or thing mentioned in the instrument, and place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it, is admissible in evidence. *Hancock v. Watson*. 10, 540

23. *Absolute deed with written defeasance.*—Effect of transfer of mortgage.—The conveyance of an interest in a mining claim by a deed absolute in form, will constitute a mortgage if the grantor at the same time take back a written defeasance, and if the grantee re-convey the premises such conveyance will constitute an assignment of the mortgage. *Halsey v. Martin*, 10, 540

24. *Equity of redemption, subject to sale.*—The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure. *Id.*

25. *Foreclosure and not sale* is the remedy of an equitable mortgagee of a share in a mining partnership. *Redmayne v. Forster*, 10, 541

26. *Pre-emption arrangement between partners.*—Account for foreclosure. *Id.*

27. *Chattel mortgage by corporation against public policy.* *Robert's Appeal*, 10, 560

MORTGAGE. *Continued.*

28. *Burden of proof in case of fraud—Debt for valueless stocks.*—In a suit to foreclose a \$3,000 mortgage it appeared that \$1,000 of the debt was for mining stocks, which the defendant claimed were worthless, and which he testified the plaintiff agreed to take back at \$1,000. The plaintiff and another witness testified that the plaintiff's only representation as to the stock was that he had paid \$1,000 for it: *Held*, that the burden of proof to show fraud or misrepresentation was upon defendant, and having failed to show it, he could not have the \$1,000 deducted from the mortgage. *Renton v. Maryott*, 10, 564

29. *Entry for condition broken—Effect upon intervening lease.*—It is in the power of the mortgagee, on entry for condition broken, where the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant. *Gartside v. Outley*, 10, 546

30. *To attack decrees and sale collaterally is impossible; it must be done by a direct proceeding instituted for the purpose.* *Id.*

31. *Deed and title bond construed as mortgage.* *Walker v. Tiffin Co.*, 10, 572

32. *Decree should not extend beyond the case made in the bill.* *Id.*

33. *Finding not disturbed.*—A finding that a bill of sale was intended as a mortgage will not be disturbed on appeal when the evidence is conflicting. *Sharpe v. Arnott*, 10, 580

34. *Peculiar instrument construed as mortgage.* *Id.*

35. *Power of corporation to mortgage its property.* *Carpenter v. Black Hawk Co.*, 10, 582

36. *Disputing validity of mortgage—Estoppel.*—The fact that bonds secured by a mortgage upon the corporate property were used both to pay debts and also to carry on the business of the corporation, does not render the mortgage invalid. The corporation and its stockholders having enjoyed the benefits of such bonds, would be estopped from repudiating either the bonds or the mortgage. *Id.*

37. *Mortgage not void because it includes franchises.* *Id.*

38. *No particular form required to create mortgage.* *Id.*

39. *Mortgage of future real estate.*—A mortgage need not be confined to the present real estate of a corporation, but may include property to be afterward acquired. *Id.*

40. *Colorado real estate sold under power of sale in New York.*—It is no objection to a mortgage that it authorizes the sale of the mortgaged premises situate in Colorado, after certain specified notices in New York. The New York statutes relative to sales under power in mortgages do not apply to such a case; in the absence of statute the parties have the power to agree upon the manner of sale to realize the security. *Id.*

41. *Validity of such mortgage under New York statute.* *Id.*

42. *Allowance to mortgagee for improvements and repairs.*—In taking the accounts under the decree in a redemption action against a mortgagee in possession, the mortgagee is entitled to "necessary repairs," under the head of "just allowances;" but to entitle him to "per-

MORTGAGE. *Continued.*

manent improvements" or "substantial repairs" he must make out a case for them at the trial. *Tipton Co. v. Tipton Co.*, 10, 591

48. *Stone severed after mortgage—Prior lien of workmen.—Held*, that the stone was subject to the lien of the mortgage, but that under the circumstances it must be postponed to the lien for the quarrymen's wages. *Am. Trust Co. v. Belleville Co.*, 10, 594

44. *Mortgagee allowing mortgagor to work a quarry as his own.—Held*, to have let in an intervening lien. *Id.*

45. *Mortgagor entitled to income of property.—*Until the mortgagee of a coal mine takes possession, either in person or by receiver, the mortgagor is entitled to the income derived from operating the same. *Young v. Northern Ill. Co.*, 10, 596

46. *Assignment of drafts—Advances on mine proceeds.—*The mortgagor, prior to the appointment of a receiver, assigned to a creditor bank certain drafts, drawn upon parties for the approximate amounts of their several coal bills for the then current month. Subsequently, and after the appointment of a receiver, the mortgagor gave to the bank drafts upon the same parties for the actual amounts due: *Held*, that the demands represented by the drafts were assets of the mortgagor company, and it had the right to pledge or assign them to secure the bank, and that the assignment of the latter set of drafts being only the consummation of the previous agreement of the parties, was valid, and passed title to the bank. *Id.*

47. *Idem—Conflicting equities of creditors.—*The fact that, at the time of the appointment of the receiver, the mortgagor company was largely in debt to its miners, and that the mortgagees were compelled to advance the necessary funds to pay them, would not give to the mortgagees a right to the proceeds of such drafts, as against the bank. *Id.*

48. *Reconveyance of title to mortgagee.—*S. held a deed of mining ground as a mortgage to secure an existing indebtedness; he conveyed the premises to P., and after two or more transfers of the title, the property was re-deeded to S.: *Held*, that when the title returned to S., the same equities attached to it in his hands as existed at the time he made the conveyance to P. *Brophy Co. v. Brophy Co.*, 10, 601

49. *In a mortgage to secure an antecedent debt*, the mortgagee is not regarded as a purchaser, and therefore his lien will be postponed to that of a prior but unrecorded one. *Bybee v. Hawkett*, 11, 594

50. *Attempted set-off by junior mortgagee.—*In a suit to enforce the lien of a mortgage, a subsequent mortgagee, who is made defendant on that account, can not set up a claim or have a decree against the plaintiff for the amount of his debt upon the ground that the plaintiff is personally liable to him therefor as partner of his mortgagor. *Id.*

51. *Working by mortgagor in possession.—*The opening of a quarry by a mortgagor in possession inures to the benefit of the mortgagee of the term, so as to render him punishable for waste if he worked the quarry during the term. *Elias v. Snowden Co.*, 15, 143

MUNICIPAL CORPORATION.

1. *Virginia city charter construed. City of Virginia v. Chollar Potosi Co.*, 14, 120
2. *Adjournments of meetings of county commissioners.*—The judges discuss the question as to the time when the meeting should be held, and the power of the commissioners after adjournment to revoke the order, and meet at an earlier day. *State v. Manhattan Co.*, 14, 149

NATURAL GAS.

1. *The transportation of natural gas for public consumption is a public use. Johnston's App.*, 15, 556
2. *Payment conditioned on striking gas. Held*, that the breach was complete by failure to sink the well—but without ruling on the measure of damages. *Washington Co. v. Johnson*, 16, 165

NEGLIGENCE.

- A—DEFINED—INSTANCES.
- B—DEGREES OF—MEASURE OF DAMAGES.
- C—PARTIES—MASTER AND SERVANT.
- D—MACHINERY—WORKINGS—MINE ACCIDENTS.
- E—KNOWLEDGE—NOTICE.
- F—PLEADING—PRACTICE.
- G—EVIDENCE.
- H—CONTRIBUTORY.

A. Defined—Instances.

1. *Negligence Defined.*—"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place or person." *Richardson v. Kier*, 4, 618
2. *Human agency aiding natural causes.*—That water will naturally descend is entirely consistent with its descent being so controlled or directed in a particular instance by accountable human agency as to work an injury to lands lying below, which would not otherwise have resulted. *Robinson v. Black Diamond Co.*, 14, 98
3. *Mining for coal is a dangerous occupation. Barksdale v. Finney*, 14, 541
4. *Responsibility for accident from natural causes.*—A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have been without default or negligence. *Fletcher v. Smith*, 5, 78
5. *Coal owner required to leave pillars although released from injuries resulting to the surface from mining. Livingston v. Moin-gona Co.*, 10, 696
6. *Tapping swollen ditch by the owner so as to flood a farm where he might easily have run off the water without injury to the farm, will justify a verdict imputing negligence. Turner v. Tuolumne Co.*, 1, 107

NEGLIGENCE—Defined—Instances. *Continued.*

7. *Prior appropriation as affecting accidental injuries.*—There is no doubt that ditch owners would be responsible for wanton injury or gross negligence, but they are not liable for mere accidental injury to claim located subsequent to the construction of the ditch, if no negligence is shown. *Tenney v. Miner's Ditch Co.*, 11, 81

8. *Percolation into tunnel from irrigating ditch—Sic utere tuo, applied to such interfering rights.* *Gibson v. Puchta*, 12, 227

9. *What is due care and ordinary diligence depends much on the business and the material.* *Ardesco Co. v. Gilson*, 10, 660

B. Degrees of Measure of Damages.

10. *Careless management of water ditch.*—In an action for injury to land by reason of the alleged careless management of defendant's water ditch, the rule applicable is, that "defendant is bound to the use of such care in the management of the ditch as prudent persons employ in the conduct of their own affairs." *Campbell v. Bear River Co.*, 10, 656

11. *The owner of a ditch is bound to use that care and caution which a prudent man would use if the risk were his.* *Wolf v. St. Louis Co.*, 10, 636

12. *Negligence in such case a question of fact.*—The degree and fact of prudence must depend upon the particular circumstances of each case; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross, or even criminal, negligence. *Id.*

13. *Injuries to garden by breaking of reservoir—Degree of negligence—Error in instruction cured by explanation.* *Todd v. Cochell*, 10, 655

14. *Subsidence of land owing to negligence in mining—Smoke from coke ovens injuring crops.* The land owner is entitled to such damages as the jury believe from the evidence he has thereby sustained. *Brown v. Torrence*, 10, 692

15. *Damages for pain and anxiety.*—The jury, in estimating the amount of damages for physical injury may consider, and may be instructed to consider, the suffering and anxiety of mind of the plaintiff, caused by the injury, though not included in the complaint. *Wright v. Compton*, 2, 189

C. Parties—Master and Servant.

16. *Employment of competent persons of good character, with due care in choosing them renders the employer irresponsible for injuries to others from their negligence or want of skill.* *Ardesco Oil Co. v. Gilson*, 10, 660

17. *Idem—Boiler explosion.*—If one employs a reputable machinist to construct a steam engine and it blows up from bad materials or unskillful work, the employer is not responsible for injury it causes. *Id.*

18. *Machinery built on employer's own plan.*—The rule is different if the machine is made according to the employer's own plan, or he interferes and gives directions as to its manner of construction. *Id.*

NEGLIGENCE—Parties, etc. Continued.

19. *There is no difference between liability to a stranger and to a servant for a man's own negligence or want of skill. Id.*

20. *Lessor not liable for surface injuries resulting from negligence of lessee. Offerman v. Starr,* 10, 614

21. *Idem. as to licensor.*—There would be no difference in regard to the responsibility of defendants if the instrument were a license in terms. *Id.*

22. *Tort of lessees.*—Lessors are not liable for the wrongful acts of the lessees of their mines not done by their authority or command. *Little Schuylkill Co. v. Richards,* 10, 661

23. *Rule as to corporate liability.*—The officer having charge of the business must for all practical purposes be regarded as the corporation itself, and that the same rule of liability must be applied to corporations as to natural persons. *Ardesco Oil Co. v. Gilson,* 10, 669

24. *Accident from reservoir bursting in hands of contractor. Boswell v. Laird,* 10, 616

25. *Respondent superior, when not to apply.*—The relation of the parties is that of independent contractors; the relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondent superior* does not apply. *Id.*

26. *Ordinary and extraordinary risks.*—Where an employee contracts to perform, for extra compensation, hazardous service, he only contracts to take upon himself the risks incident to that employment and not risks growing out of the negligence of the employer. *Trihay v. Brooklyn Co.,* 15, 585

27. *Co-employee—Superior and inferior servants.*—A corporation is not liable for injuries suffered by an employee through the negligence of a co-employee of a different grade, not vested with authority in the general management of the corporate business. *Peterson v. Whitebreast Co.,* 11, 1

28. *Coal dirt in stream—Contribution to injury. Little Schuylkill Co. v. Richards,* 10, 661

29. *Liability of architect* is where the defect is inherent in his plan. If the plan be devised by the owners, and the builders simply engaged to carry it out, and the defects from which the injuries resulted be inherent in the plan, then the former would be liable to plaintiffs. *Boswell v. Laird,* 10, 616

30. *Proprietor not liable because accident happened on his premises. Id*

D. Machinery—Workings—Mine Accident.

31. *Choice of instrumentalities.*—Where unsafe instrumentalities are needlessly used to perform a particular work, this adoption is negligence. *Berea Co. v. Kraft,* 10, 16

32. *It is culpable negligence* to avoid keeping mining works prudently protected. *Lake Superior Co. v. Erickson,* 10, 89

33. *Duty to employes—Safe machinery.*—Employers owe to their servants and workmen the exercise of reasonable care and proper diligence in providing them with safe machinery and suitable tools, and

NEGLIGENCE—Machinery, etc. *Continued.*

employing with them fit and competent superintendents and fellow workmen. *Ardesco Oil Co. v. Gilson*, 10, 669

84. *Neglect of statutory mine regulations.*—Where a mining company failed to comply with the terms of the act of 1872, which required the top of each shaft to be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft, the company is liable for the resulting death of an employe using due care. *Bartlett Co. v. Roach*, 10, 632

85. *Neglect of company and that of co-employe distinguished.*—The failure of a company to comply with the statutory requirement which results in injury to the employe, distinguished from cases where injury is the result of negligence of a co-employe. *Id.*

86. *Defective ladder—Employer not an insurer of safety but bound to diligence.* *Canter v. Colorado M. Co.*, 15, 539

87. *Plaintiff was injured by a scale while timbering a fresh stope.*—The evidence tended to show that the ground required immediate timbering, as the stope was broken, to keep it safe: *Held*, sufficient proof of negligence to sustain a verdict. *Trihay v. Brooklyn Co.*, 15, 535

88. *Running cars during recess for men to occupy the gangway is negligence.* *Silver Cord Co. v. McDonald*, 16, 171

89. *Idem—Rule habitually disregarded.*—The permitted non-observance of the rule makes its violation by the men no defense to the company. *Id.*

40. *A company adopting rules* should conform to them, and if it fails to observe them it is liable for the consequences. *Id.*

41. *Miner killed while off duty.*—*Held*, that not being engaged in the line of his duty at the time of the injury he stood in the same relation as a visitor to the mine and could not complain of defendant's negligence. *Wright v. Rawson*, 11, 3

E. Knowledge—Notice.

42. *Evidence of admission by employer of knowledge of danger to employe* sufficient to justify the submission of the question of his negligence to the jury. *Strahlendorf v. Rosenthal*, 10, 676

43. *No implied knowledge of danger from contact of hot slag with water.* *McGowan v. La Plata Co.*, 10, 59

44. *Idem—Knowledge of facts and knowledge of implied dangers distinguished.*—It is not so much a question whether the party injured has knowledge of all the facts in his situation as whether he is aware of the dangers that threaten him. *Id.*

45. *Injury from falling bucket—Presence of master—Working after knowledge of danger.*—Plaintiff, a workman employed in sinking a pit, was injured by the fall of a tub filled with water. Evidence was given that the hoisting tackle was defective, not being fitted with a safe hook, and that the jiddy should have been used for hoisting the water as well as the earth. The master was at the works several times each day. *Held*, that the master was not liable, the plaintiff himself having attached the bucket to the hook and the plaintiff's fellow workmen having neglected to use the jiddy. *Griffiths v. Gidlow*, 10, 639

NEGLIGENCE—Knowledge—Notice. *Continued.*

46. *Duty of company to protect gangway.*—Notice to overseer of the dangerous condition of the roof was notice to the company; and if this was long enough before the falling of a rock from the roof, killing an employe, to have given time to repair the same, was sufficient to fix negligence upon the company. *Quincy Coal Co. v. Hood*, 12, 143

F. Pleading—Practice.

47. *Competency of engineer, a question of fact.* *Joch v. Dankwardt*, 10, 690
48. *Ditch flooding ditch—Sufficiency of complaint.*—Form of complaint in case of ditch flooded by another ditch given in full as sustained by the court of review. *Tuolumne Co. v. Columbia Co.*, 10, 684
49. *Variance as to kind of negligence charged.*—Where the complaint avers neglect by failure to furnish suitable machinery, instructions based on negligence by the improper use or handling of machinery in itself safe, are not pertinent. *Berea Stone Co. v. Kraft*, 10, 16
50. *Joinder of causes of action.*—In an action for injuries to mining claims occasioned by the negligent building of defendant's dam, the plaintiffs claimed damages for the washing away of their pay-dirt, and also for preventing them from working their claims by reason of the overflow. *Held*, that there was no improper joinder. *Fraler v. Sears Co.*, 12, 98
51. *Sufficient allegation of the fact of negligence on part of defendant.*—*Held*, that the complaint stated a good cause of action, and that the plaintiff in making out his case could not be required to show a want of concurring negligence, the proof of which should rest with defendant. *Knarborough v. Belcher Co.*, 12, 155
52. *Instances of slight variance as to the cause or notice of the accident,* held not material. *Strahlendorf v. Rosenthal*, 10, 676; *Litchfield Co. v. Taylor*, 10, 685

G. Evidence.

53. *Conflicting evidence as to apparent danger in working under a scale;* the court refused to disturb the verdict of the jury, finding no negligence on the part of a workman who ventured under it. *Lake Superior Co. v. Erickson*, 10, 39
54. *Duty of a miner to tap roof and judge of its safety,* should be noted in instructions to jury if asked for by defendant. *Money v. Lower Vein Co.*, 10, 56
55. *No defense that injury could have been prevented by the commission of a trespass.* *Wolf v. St. Louis Co.*, 10, 653
56. *Prerequisite to recovery on account of death by negligence,* under the statute giving an action for wrongfully causing the death of a human being. *Quincy Co. v. Hood*, 12, 148

H. Contributory.

57. *Contributory negligence a question for the jury.* *Strahlendorf v. Rosenthal*, 10, 676

NEGLIGENCE—Contributory. *Continued.*

58. *Carelessness of party injured* will not be a sufficient defense to an action for damages for the injuries suffered by the breaking of a dam. *Fraser v. Sears Co.*, 12, 98

59. *Want of presence of mind* in the person is no excuse to the defendant, by whose negligence he is placed in the position of peril. *Silver Cord Co. v. McDonald*, 16, 171

60. *Warning to deceased and by him to others may be proved* to establish contributory negligence on his part. *Lehigh Valley Co. v. Jones*, 10, 80

61. *Deferring to advice of others.*—It is not contributory negligence for an employe to defer to the opinions and assurances of those who are supposed to have special knowledge as to whether it is safe or not. *Lake Superior Co. v. Erickson*, 10, 89

62. *Acquiescence in known neglect of fellow servant.*—When a servant is injured or killed while in the employ of his master, by an accident resulting from the habitual negligence of his fellow servants, known and acquiesced in by the master, the master is not liable to an action by the servant, or, if he be killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident. *Senior v. Ward*, 10, 646

63. *Unless there be such contributory negligence* by the servant, the master is liable. *Id.*

64. *Willful injury excuses contributory negligence.* *Litchfield Co. v. Taylor*, 10, 685

65. *Facts not amounting to contributory negligence.*—The fact that deceased may have been heard to say in conversation with strangers, that he preferred to be hoisted in an uncovered cage, or the fact that he went on the cage before the signal was given, when the man in charge of the cage had made no remonstrance, and the deceased and his comrades supposed the signal had been given, do not show that the misconduct of the deceased materially contributed to the injury. *Id.*

66. *Fencing Machinery Statute construed.*—*Fellow servant's contributory negligence.*—The syllabus states facts amounting to such instance. *Honor v. Albrighton*, 11, 6

NEW TRIAL.

1. *Requisites of newly discovered evidence stated.* *Stoakes v. Munroe*, 2, 246; *Live Yankee Co. v. Oregon Co.*, 12, 94; *Jenny Lind Co. v. Bower*, 5, 590

2. *A motion for a new trial will not be allowed* on the ground of surprise that ordinary prudence would have prevented; besides, the plaintiff could have taken a non-suit under section 148 of the Practice Act. *Brown v. Smith*, 4, 539; *Live Yankee Co. v. Oregon Co.*, 12, 94

3. *Newly discovered evidence as ground for new trial.*—A new trial will not be granted on the ground of newly discovered evidence, which consists of a deed recorded in the recorder's office twelve months prior to the trial, and a record of a judgment in the same court in which the cause was tried. *Weimer v. Lowery*, 4, 543

NEW TRIAL. *Continued.*

4. *Statement on motion for new trial—How authenticated.*—Any satisfactory evidence in the record that the statement has been examined and approved by the judge, is sufficient. *Kidd v. Laird*, 4, 571

5. *Diligence—Cumulative evidence.*—A new trial will not be granted if the affidavits of newly discovered evidence do not show that diligence was used to obtain it, nor if the evidence is cumulative. *Caruthers v. Pemberton*, 4, 628; *Snyder v. Burnham*, 15, 563

6. *Judgment contrary to evidence—Rule the same at law and in equity.*—If, upon appeal, a substantial conflict appears in the testimony upon the issues, the judgment will be affirmed; but if not, and the evidence is against the judgment, it will be reversed, and a new trial granted, and this rule applies as well at law as in equity. *Clark v. Willett*, 4, 628; *Maine Boy's Co. v. Boston Co.*, 12, 247

7. *Is not allowed on reversing judgment*, when no probability appears that the evidence would be materially different on a new trial. *Clegg v. Jones*, 7, 572

8. *The rulings upon a motion for a new trial are not open to consideration in the U. S. Supreme Court.* *Dahl v. Baunheim*, 16, 214

NON-SUIT.

1. *Practice on appeal from judgment of non-suit.*—In considering the correctness of the ruling of the court below in granting a non-suit, this court will consider as proven, every fact which the evidence tended to prove. *Herbert v. King*, 5, 803

2. *The refusal to grant a non-suit is in the discretion of the trial court*, and no exception lies to the denial of the motion; and if defendant proceed to offer evidence, it is a waiver of the motion. *Bradley v. Poole*, 6, 581

3. *Forced by erroneous rulings.*—A plaintiff may move to set aside a non-suit to which he had assented, when driven thereto by rulings of the court making it apparent that he could not recover. *Conner v. McPhee*, 1, 570

4. *Should be granted*, when the plaintiff closes his evidence, if the court is of opinion that it would not sustain a verdict in his favor. *Ensminger v. McIntire*, 14, 440

NOTICE.

1. *Notice by record.*—The title of the grantor, as it appears properly on the record, known to the grantee at the time that he accepts his conveyance, is a conclusion *juris et de jure*. *Wallace v. Silsby*, 3, 890

2. *A party having notice of the contents of a writing has notice of its legal effect.* *Van Dusen v. Star Co.*, 3, 26

3. *Effect of actual notice of location.*—In the absence of any miners' rule or regulation making recording a necessary act or condition of a complete location, or providing for a forfeiture by failure to record, a prior location of a mining claim, without recording the same, gives the locator the exclusive right as against all persons having actual notice of such location. *Jupiter Co. v. Bodie Co.*, 4, 418

4. *Reasonable notice is relative.* *Philadelphia Co. v. Taylor*, 5, 133

NOTICE. *Continued.*

5. *Sufficiency of notice to produce papers as to time and description.*
Burke v. Table Mountain Co., 5, 209
6. *Constructive notice by record* only applies where the instrument has been certified (acknowledged) as required by the statute. *Wicks v. Chicago Co.*, 5, 536
7. *Notice required by statute.*—An order refusing an injunction will not be disturbed on appeal if the record fails to show a notice of the application, or an order to show cause as required by statute. *Lady Bryan Co. v. Lady Bryan Co.*, 7, 478
8. *Judicial notice of suits affecting the mine.*—In applications for injunction, a judge may take judicial notice of the files of his own court, showing suits involving the legal title to the property. *Lyon v. Woodman*, 7, 494
9. *Order without notice vacated.*—An injunction granted at chambers, without notice, may be dissolved without notice. *Leitham v. Cusick*, 7, 546
10. *Mining is notice sufficient* of all rights which the parties hold who prosecute the same. *Harkness v. Burton*, 9, 318
11. *Notice by possession under unrecorded deed.* *Fair v. Stevenot*, 11, 11
12. *The subsequent purchaser may show that he used due diligence* in making inquiry, and failed to obtain a knowledge of the prior unrecorded deed. *Id.*
13. *Possession of mining lessee is notice of his interest.* *Sheets v. Allen*, 11, 16
14. *Special instruction as to notice and demand construed.* *Hixon v. Pixley*, 11, 555
15. *Where the purchaser of an interest in a claim is aware of its being worked* by partners, he has notice of a partner's lien. *Duryea v. Burt*, 11, 396
16. *Actual knowledge of facts is equivalent to notice.* *Maturin v. Tredinnick*, 13, 15
17. *Notice of annual meeting* for the election of a board of trustees, as required by statute, can not, unless all the stockholders be actually present, and consenting in person or by proxy, be legally held until after notice of the time and place thereof given in some authentic and legal mode. *San Buenaventura Co. v. Vassault*, 13, 550
18. *Idem—Time fixed in by-law.*—The fact that a by-law of the corporation designates "the third Monday in April, at the office of the company, in San Francisco," as the time and place for the meeting, does not dispense with the notice, as no hour is named. *Id.*
19. *Location notice without discovery inoperative.* *Erhardt v. Boaro*, 15, 473
20. *Where notice is given to an alleged, but unauthorized, agent,* and is by him given to the proper party, the agency or authority of the first becomes immaterial. *McCahan v. Wharton*, 16, 239

See LOCATION NOTICE.

NOVATION.

1. *Creditor's suit against successor to corporation.*—A creditor of

NOVATION. *Continued.*

a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation, and which it is ample to pay, may prosecute his own claim regardless of other creditors. *Barksdale v. Finney*, 14, 542

NUISANCE.

1. *Ditch wrongfully diverting water from the premises*, is as much a nuisance as to turn upon them a destructive element. *Parke v. Kilham*, 4, 528

2. *Title in United States no defense to nuisance*, nor can defense be made of the great cost of the undertaking, its great length, or its utility, or the fact that it is constructed for mining purposes. *Weimer v. Lowery*, 4, 548

3. *No equitable relief to idle ditch*.—Complaining of reservoir charged to be a nuisance. *Bear River Co. v. Boles*, 4, 592

4. *Obstruction of water in a mining gulch*, to the common injury of many miners working their possessory claims below, is a nuisance which miners might abate in a peaceable manner, if they were first in the appropriation of the water for mining uses. *Stiles v. Laird*, 11, 21

5. *The statute of California defining what are nuisances* and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances which the statute does not embrace. *Id.*

6. *Water for farm purposes polluted by mines*. *Wheatley v. Chrisman*, 11, 24

7. *Claim injured from ditch located prior thereto*.—Held, that the rights of the parties were acquired at the dates of their respective locations, and that the rule of "coming to a nuisance" might be applied. *Tenney v. Miners' Ditch Co.*, 11, 81

8. *Remedy in equity for diversion of water*.—Diversion of a water-course is a private nuisance; and while no equitable remedy can be had for a mere past diversion, yet a continued diversion is such an irreparable injury as equity will redress. *Tuolumne Co. v. Chapman*, 11, 84

9. *Damages, without injunction*.—Though A may be disentitled, by acquiescence, to an injunction to stop B's works, which are noxious to the neighborhood, yet it does not follow that B is entitled to an injunction to prevent A's recovering damage at law. Equity may leave both parties to their legal rights. *Bankart v. Houghton*, 11, 87

10. *Enlargement of works originally erected with acquiescence*, may not be made of the enlargement creates nuisance. *Id.*

11. *Application of the rules above stated*.—Injunction to prevent (on the ground of acquiescence) a party injured by copper works from collection of a judgment in damages obtained at law for the injury, refused with costs. *Id.*

12. *The owners by prior appropriation of a water ditch are entitled to have the water flow therein in its natural state*; its corruption by any stranger is a private nuisance. *Crane v. Winsor*, 11, 69

13. *Equitable interference*.—Equity will restrain the continuance of a private nuisance at the suit of the sufferer. *Id.*

NUISANCE. *Continued.*

14. *Pleading in such case.*—Complaint in case at bar commented on and held sufficient. *Id.*

15. *The keeping of a powder magazine.* *Heeg v. Licht*, 11, 74

16. *Injunction against continuing injuries.*—Where a business complained of is a dangerous nuisance, and the injury is continuous and cumulative and the mischief irreparable, a court of equity will enjoin the prosecution of such business. *Penna. Lead Co.'s App.*, 11, 84

17. *Idem—Lead smelting works.*—And if it appears that works for smelting lead are of such a character and the injury inflicted of such nature, a court of equity will restrain their use. *Id.*

18. *Abatement of nuisance—Right to obstruct water-course.*—The plaintiffs by parol license from L. and from the defendant, constructed a water-course, and thereby discharged the water from their own mines across the land of L., and thence across the land of the defendant. The defendant, having revoked his license, upon the plaintiffs' refusal to discontinue using the water-course, entered upon the land of L. at a spot near the boundary between it and the land of the plaintiffs, and obstructed the water-course. The defendant, by stopping the water-course on his own land, would have done less damage to the plaintiffs than was actually done, but more damage to L. and possibly some damage to the public: *Held*, that the water-course was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who, after the revocation of the license, were wrongdoers, was subordinate to the convenience of innocent third persons and of the public. *Roberts v. Rose*, 14, 441

19. *The St. Helen's Smelting Works Cases.*—These cases apply the maxim *sic utere tuo*, qualified only by the maxim that the law regards not trifling inconveniences; make distinction between nuisances affecting the person and those affecting property; decide that no special locality may be condemned, as it were, to the use of noxious trades, and refuses to recognize the rule as to giving no relief to one coming to a nuisance. *St. Helen's Company v. Tipping*, 11, 50; 11, 573 (But the cases here reported have since been reversed in the House of Lords. — — —.)

20. *Plaintiff, the owner of a small stream used for domestic purposes*, sued defendants, coal operators, for damages by pumping mine water, which destroyed the value of the stream for drinking purposes. The case became one between classes, and as here reported has been since overruled by the same court. *Sanderson v. Penn. Coal Co.*, 11, 60; *Same ads. Same*, 11, 79. Reversed. 113 Pa. St. 126.

OCCUPATION.

1. *Occupation distinguished from possession.* *Quicksilver Co. v. Hicks*, 11, 98

See POSSESSION.

OFFICER.

1. *Officers de facto.*—Parties illegally appointed to office but properly commissioned by the governor of Utah Territory, acted under such commissions. *Held*, that they were officers *de facto*, and their acts as to third persons valid. *Mallett v. Uncle Sam Co.*, 1, 17

OFFICER. *Continued.*

2. *To create an officer de facto it is necessary that he should be in peaceable possession of the office, actually exercising the functions of an officer; it is not sufficient that he has intruded himself by force.* *State v. Curtis*, 8, 680
3. *Ignorance of official duty no excuse.* *State v. Kruttschnitt*, 14, 180

OIL.

1. *Oil, like water, is not the subject of property, except in actual occupancy.* *Dark v. Johnston*, 9, 283
2. *Property in oil as a fluid.*—Oil discovered in a well sunk by the owner of the land is his exclusive property, whether drawn from an underground current of oil or found standing; and the case is not analogous to the surface owner's right in running streams of water. *Hail v. Reed*, 11, 103
3. *Oil extracted by a wrongdoer out of the owner's well remains the property of the owner.* *Id.*
4. *Oil barrels—What measure intended.* *Forsyth v. North Am. Oil Co.*, 11, 115
5. *Oil sold by sample.*—A written agreement was drawn for the delivery of "oil of the quality of the sample." Certain oil was delivered: *Held*, that the defendant might show that the oil was not of the quality the plaintiff agreed to deliver. *Maute v. Gross*, 11, 123
6. *Idem—Fraud.*—The court rightly charged that in a sale by sample, "where the adoption of a sample had been fraudulently procured, the party who has practiced such fraud should not complain if he is denied any advantage of his wrong." *Id.*
7. *Repair of oil tank agreed to by lessee in lieu of rent*, implies no more than the restoration in kind of the faulty parts. *Ardesco Co. v. Richardson*, 11, 131
8. *Oil is a mineral* and is included in the act of 1850, relating to tenants in common of minerals, under the general term of "other minerals." The fact that oil was not then known as a product of land does not alter the matter. *Thompson v. Noble*, 11, 137
9. *Rights of tenants in common of oil in tank.* *Mason v. Norris*, 11, 140
10. "Protection" to oil lease is defined by the bounds named, extended to their intersection. *Allison's App.*, 11, 142
11. *Injunction against operation on the protection.* *Id.*
12. *Sudden flow of oil in unexpected quantity* considered in connection with alleged breaches of the covenants of the instrument under which the strike was made. *Chicago Co. v. U. S. Co.*, 12, 570
13. *Sufficient proof of "non-productive" well.* *Rice v. Ege*, 13, 179

OPTION.

1. *Pre-emption agreement between partners, when waived—Application to facts.*—Where there is a privilege of pre-emption in a contract between mining partners, a subsequent sale, by consent, of a part interest of one partner, or a descent cast, will prevent the further operation of the covenant. *Weisman v. Smith*, 11, 153

ORE.

1. *Discovery of copper ore after contract concerning partition of iron ores.* *Blewett v. Coleman*, 11, 160
2. *Evidence of value of ore from other places in the same mine* is of little value in ascertaining the contents of any lot in question; whether competent at all, not decided. *Phipps v. Hully*, 15, 350
3. *A purchaser in good faith of ore taken from a mine by a trespasser* is guilty of conversion. *Omaha Co. v. Tabor*, 16, 184
4. *The measure of damages for such conversion* is the value of the ore sold, less the cost of raising it from the mine after it was broken, and hauling to defendant's place of business. *Id.*

PARTIES.

1. *Where parties are numerous*, and it is impracticable to bring them all into court, a suit may be allowed by some of them on behalf of themselves and others, without requiring all persons interested to be made parties. *Von Schmidt v. Huntington*, 6, 284
2. *Dissolution of association.*—A joint stock association formed for a definite period can not be voluntarily dissolved without unanimous consent; if such consent can not be had, application must be made to the court. *Id.*
3. *Interest necessary in plaintiff.*—In order to sustain a bill in chancery, it is necessary that the plaintiff should have an interest in the subject of that suit, or a right to the thing sought. *Gaston v. Plum*, 11, 168
4. *Bill by owner of right to mine brought after assignment.*—The grant of a right to mine is not of such a fiduciary capacity, or so personal in its character, or so uncertain in its nature, as to be incapable of assignment: therefore, where the grantee of such a right has assigned the same before bringing his bill he has no interest in the suit, and his bill must be dismissed. *Id.*
5. *Suit in partnership name dismissed*, because the appellants, "the proprietors of the Mexican Mill," are neither natural nor artificial persons, sustained, because they have no authority to prosecute under a copartnership name, and the proceeding is an absolute nullity. *Mexican Mill v. Yellow Jacket Co.*, 11, 175
6. *Non-joinder of parties as defense.*—G., a manager and part owner of a mining claim, sold to defendant certain ores extracted from the mine. In an action brought by G. for the price of the ore, defendant pleaded non-joinder of parties plaintiff, and alleging who were the true owners of the ore. On the trial defendant offered to show who were the real owners, whereupon the testimony was excluded. *Held*, that this ruling was error, and that defendant was entitled to sustain his plea of non-joinder by competent proof. *Goodspeed v. Wasatch Works*, 11, 178
7. *Idem—Part owner can not recover alone.*—In the face of a plea of non-joinder neither a part owner as such, nor as manager, can recover alone for the price of ores sold. *Id.*
8. *A non-joinder of parties plaintiff* is a good ground of non-suit. *Id.*
9. *Parties to action to dissolve mining partnership.*—All those

PARTIES. Continued.

owning interests in the partnership are necessary parties. *Settembre v. Putnam*, 11, 425

10. *Joint action by stockholders.*—Stockholders suffering a common injury are not required to bring separate suits. *Robinson v. Smith*, 3, 443

11. *Tenants in common in a mine*, each owning undivided interests, acquired at different times, may sue jointly to recover possession of all their several undivided interests. *Goller v. Fett*, 11, 171

12. *If a party misjoined as defendant do not complain*, it is not for the other defendants to demur for such misjoinder. *Davis v. Henry*, 6, 680

13. *Suit in name of landlord for use of tenant.*—Where a railroad company has the right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath the way to be mined, a tenant of such owner—the terms of whose lease give him the right to mine all the coal in the land demised—may sue in the name of the landlord for breach of such covenant. *Mine Hill Co. v. Lippincott*, 12, 555

14. *Retroactive statute, removing disability of person to sue.* *Green v. Ashland Co.*, 12, 692

15. *Inability to recover, distinguished from incapacity to maintain suit.* *Id.*

16. *Refusal of nominal plaintiff to authorize suit for another can not prevent a recovery.* *Kimmins v. Wilson*, 2, 159

17. *Non-joinder of defendants.*—The non-joinder of some who should be parties is not ground for general demurrer to a bill, for that may be cured by amendment. *Hand v. Dexter*, 3, 608

18. *Amendment by adding plaintiffs.*—The action to recover damages for the death of the miner was brought by his widow, within a year, as required by the act of assembly. After the expiration of the year the children were also made plaintiffs, though the cause of action was unchanged. This was allowed. *Delaware Co. v. Carroll*, 10, 48

19. *Widow substituted for administratrix as plaintiff.*—An action to recover damages for the death of a miner is properly brought by the widow of the deceased. *Litchfield Co. v. Taylor*, 10, 684

20. *No plaintiff, a fatal defect—No amendment.* *Mexican Mill v. Yellow Jacket Co.*, 11, 175

21. *When the United States retires from the prosecution of a suit* instituted to vacate a patent of public land, without causing the appeal to be dismissed, and another party, claiming the same land under another patent, is in court to prosecute the appeal, this court will not dismiss it on the motion of the appellee as of right, but will look into the case, and if the circumstances require it, will hear argument on the case, and decide it. *U. S. v. Marshall Co.*, 16, 205

22. *Bill dismissed for want of necessary parties and insufficient excuse for non-joinder.* *Westcott v. Minnesota Co.*, 6, 386

23. *Necessary parties—Non-residents.*—The general rule in a court of equity is, that all persons interested in the object of the bill are necessary and proper parties. Where such parties as are not proper

PARTIES. *Continued.*

parties, are not indispensable, the bill will be retained. *U. S. v. Parrott*, 7, 886; *Cole Co. v. Virginia Co.*, 7, 516

24. *Parties beyond jurisdiction.*—Although named as defendants in the bill, are substantially not parties to the action until they are served, or till they appear. *Cole Co. v. Virginia Co.*, 7, 503

25. *A demurrer for want of parties is good only when the defect appears on the face of the bill.* *Robinson v. Smith*, 8, 443

26. *Assuming debt as consideration—Parties.*—A purchaser agreed in writing, as part of the consideration to pay the debt of his vendor to a third party: *Held*, that suit was brought against such purchaser by the third party in his own name. *Wiggins v. McDonald*, 2, 564

27. *Order to bring in other parties.*—If, in a case in equity, it appears on the trial that a complete determination of the controversy can not be had without the presence of other parties, the court may, on its own motion, order them to be brought in before final decree. *Settembre v. Putnam*, 11, 425; *Houtz v. Gisborn*, 2, 340

28. *Persons who have no real interest to be affected by a decree or judgment, and against whom no decree is asked, or can be made, are not necessary parties to a suit.* *Van Bokkelen v. Cook*, 13, 421; *Hamill v. Thompson*, 14, 897; *Barber v. Cazalis*, 2, 684; *Houtz v. Gisborn*, 2, 340

29. *Decree in absence of unnecessary party.*—An heir and distributee is a proper party in a suit to recover assets against the former administrator, but if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, it will do so. *Van Bokkelen v. Cook*, 13, 421

30. *Misnomer of immaterial party.*—In an action against the trustees of a corporation, in which the corporation is made a party defendant under the name Washington Gold Q. M. Co. instead of Washington Q. M. Co., if it appears that the corporation was a necessary party only upon a branch of the case wherein no relief was granted, the defendants are not prejudiced by the misnomer. *Parrott v. Byers*, 13, 505

31. *A plaintiff can not sue in his own right and as administrator.* *Hall v. Fisher*, 12, 88

32. *Instances where corporation interested as plaintiff may be made a defendant when it refuses to bring action.* *Jones v. Bolles*, 5, 444; *Burke v. Flood*, 5, 469

33. *Next of kin named in declaration.*—In an action by an administrator for damages on account of death by negligence, where the declaration describes the next of kin to be the father, the court can not admit proof of loss to other relatives. *Quincy Co. v. Hood*, 12, 143

PARTITION.

1. *Indivisibility of mines.*—Mines are from their nature indivisible and not partible (in most cases). The only partition that can be made is by sale, dividing the proceeds. *Lenfers v. Henke*, 5, 68

2. *Partition—Void decree as evidence of.*—A decree of court, though void, if subsequently acted on, may possibly be evidence of partition, according to the terms of such decree. *Kinney v. Consolidated Va. Co.*, 10, 457

PARTITION. *Continued.*

3. *Waiver of right to part.*—The right of partition is a beneficial incident of tenancies in common, but it may be waived by agreement of the parties in interest. *Coleman v. Coleman*, 11, 188; *Blewett v. Coleman*, 11, 180

4. *Agreement barring partition of Cornwall ore banks*—Statement of facts at length in syllabus. *Id.*

5. *Agreement barring partition* establishes a permanent tenancy in common, and partition can not be had without violating the covenant, which runs with the land. *Coleman's Appeal*, 14, 221

6. *In every partition there must be a severance* so that each tenant shall enjoy his purpart in severalty. *Id.*

7. *The grantee of the right to dig ore*, under one of several tenants in common, can not enforce partition. *Boston Co. v. Condit*, 14, 801

8. *Covenant not to part.*—The words "shall remain together and undivided as a tenancy in common," construed to mean a tenancy in common not for the present nor forever, but as long as the objects and purposes of the covenant in which they occur are in process of fulfillment, and so far they bar the action of partition. *Coleman v. Coleman*, 11, 183

9. *Partition of ore bed refused.*—The court will not order partition of real estate held in common, where the value of the several parts can not be ascertained, as in the case of an ore bed. *Conant v. Smith*, 11, 199

10. *Sale, when not decreed.*—Nor will they in such case order a sale thereof or an assignment to one of the parties, though authorized by the statute, if equal or better justice can be obtained in another way; the proper remedy of the party aggrieved is by application to the court of chancery. *Id.*

11. *Costs in partition* under the statute can not be recovered where there is no question as to the title of the respective parties. *Id.*

12. *The Supreme Court* has common law jurisdiction to part real estate. *Canfield v. Ford*, 11, 201

13. *The common grantor of tenants in common* is not a necessary party in a partition suit and has no interest whatever therein. *Id.*

14. *Colliery worked in partnership.*—The court will not order a partition of mines worked as firm assets, but will order a sale of the entirety, and in this case liberty to the partners severally to bid was allowed. *Wild v. Milne*, 11, 207

15. *Partition of water impracticable*—Sale and distribution ordered. *McGillivray v. Evans*, 11, 209

16. *Partition a matter of right.* *Dall v. Confidence Co.*, 11, 214

17. *Partition first*—Sale as an alternative. *Id.*

18. *Practice.*—A sworn answer setting up the same matter as required by statute in the affidavit, is equivalent to it. *Id.*

19. *No compensation for incidentally enhancing value.* *Id.*

20. *Equity jurisdiction of Federal courts not controlled by State statutes.* *Strettell v. Ballou*, 11, 220

21. *Partition of possessory mining claim.* *Id.*

PARTITION. *Continued.*

22. *Partition of ditch—Mortgage—Account.*—A mortgage upon an undivided interest in a ditch may be adjusted in a suit for partition and an account of water rents taken. *Bradley v. Harkness*, 11, 389

23. *Partition not incident to account.*—Partition may be made by consent; but it is not an incident to a suit for partnership accounting in which the partners usually have a right to have the assets disposed of. If land belonging to the firm is not disposed of, it must be left as a distinct tenancy in common so that the tenants may have it partitioned in a separate suit. *Godfrey v. White*, 11, 563

24. *Partition affected by lex loci.*—Partition is a local proceeding, and can only be enforced in a court which has jurisdiction of the territory where the land is. *Id.*

25. *A parol partition of a mining claim*, if followed by exclusive possession of the several parcels, is doubtless valid; the parties cease to be tenants in common, and forever after deal at arm's length. All relation of trust and confidence ceases. *480 M. Co. v. Bullion Co.*, 11, 608

26. *Co-tenants may part the mine.*—When a mining claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests may be partitioned as other real property. *Hughes v. Devlin*, 12, 243

27. *Partnership no bar to partition.*—The mere fact that a claim is owned and worked by several persons as partners, is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership. *Id.*

28. *Where a sale and division*, not a partition, is had, the statute does not require referees. *Id.*

PARTNERSHIP.

A—WHAT CONSTITUTES—RELATIONS INTER SE.

B—POWERS—LIABILITIES.

C—FUNDS—ASSETS—ASSESSMENTS.

D—LIMITED—SPECIAL.

E—MINING DISTINGUISHED FROM OTHER PARTNERSHIPS.

F—DISSOLUTION—SURVIVORSHIP—ACCOUNTING.

G—SUITS, BY, BETWEEN AND AGAINST.

A. What Constitutes—Relations Inter Se.

1. *Co-tenants working a mine* are partners. *Dougherty v. Creary*, 1, 35; *Nolan v. Lovelock*, 9, 360; *Duryea v. Burt*, 11, 395; *Skillman v. Lachman*, 11, 381

2. *Distinction between partnership and tenancy in common.* *Bradley v. Harkness*, 11, 389

3. *Partnership not created by purchase.*—Averment of a purchase of an undivided interest in a ditch, does not imply partnership. *Id.*

4. *Trailing concern—Mines and iron works* operated in connection therewith are not a mere interest in land, but a partnership in trade. *Crawshaw v. Maule*, 11, 223

PARTNERSHIP—What Constitutes—Relations Inter Se. Continued.

5. *Partnership relation of owners in ditch companies.* *McConnell v. Denver*, 11, 432
6. *Agreement amounting to partnership.*—A contract between three persons, to operate a "mining property as a company," creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of the enterprise. *Bybee v. Hawkett*, 11, 594
7. *A personal arrangement, whereby one of the partners shares his interest with a stranger, does not make such stranger a member of the firm.* Knowledge and consent of all is required. *Id.*
8. *Partnership attempting to prove corporate organization.* *Abbott v. Omaha Co.*, 4, 8
9. *Burning lime on shares.*—Where two persons agreed to burn lime on shares dividing the work and the lime, it was held, that a technical partnership existed between the parties. *Muster v. Trumpbour*, 11, 360
10. *Mine worked on family arrangement—Admission of partner used against partners—Division of nugget.* *Reid v. Barnhart*, 11, 312
11. *Partner holding lease with privilege of renewal.*—Where two entered into partnership to continue for three years, and so much longer as one of them, holding a certain lease of stone quarries, should continue lessee of such quarries: held, that the partnership expired with the lease, the partner holding it not electing to renew it. The continuance of the partnership was virtually a matter for him to decide. *Phillips v. Reeder*, 11, 419
12. *Construction of agreement to borrow capital upon firm credit.* *Patterson v. Silliman*, 11, 327
13. *Note of sundry partners for benefit of all—Contribution.*—Three of the partners in a mining company borrow money on their joint note and the money is used for the benefit of the concern. Two of them paid the note and one of them, who had advanced the share of the third maker sued such third maker for contribution. Held, that it was a transaction independent of the mining partnership, and that the action at law was maintainable. *Sedgwick v. Daniell*, 11, 337
14. *Joint stock company governed by partnership law.* *Bullard v. Kinney*, 11, 348
15. *Partnership of mining concern with merchant.*—Where a company, not incorporate, forms a trading partnership with an individual under a firm name, each member of the company is a member of the firm. *Rich v. Davis*, 11, 826
16. *Salesman not a dormant partner.*—Where one of the mining company acted as salesman of the firm, it can not be pretended that he was a dormant partner whose acts would not bind the firm. *Id.*
17. *The partnership relation is one of trust, and each member is held to a strict rule of good faith and fair and open dealing.* *Jennings v. Rickard*, 15, 624; *Bunk v. Bissell*, 11, 547
18. *Mine purchased by partner in trust for copartners.*—If two or more persons, as mining partners, develop a mine situated upon land owned by a third person, and they authorize one of their number to

- PARTNERSHIP—What Constitutes—Relations Inter Se. *Continued.*
 purchase the land of the owner for the benefit of all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine, in trust for them. *Settembre v. Putnum* 11, 425
19. *Clandestine bonus to partner.*—The party receiving it was declared to hold it in trust for the partnership. *Fawcett v. Whitehouse*, 11, 250
20. *No partner can place himself in a situation which gives him a bias against the discharge of his duty.* *Burton v. Wookey*, 11, 343
21. *Charging intermediate profit against associate.*—A partner may not buy by barter for, and charge cash against, his firm. *Id.*
22. *Claim for personal services by partner—When allowed.* *Godfrey v. White*, 11, 563
23. *Compensation inter se not implied.*—An agreement to compensate is not implied from the mere fact of services rendered. *Id.*
24. *Interest in profits as means of compensation.*—Interest in profits does not necessarily make a person a partner or liable as a partner. If interested in the profits of a mine only as a means of compensation, he is not a partner. *Le Fevre v. Castagnio*, 11, 579
25. *Where associates employ one of their own number to do a stranger's work,* they are equitably bound to pay him a stranger's wages. *Duff v. Maguire*, 12, 353
26. *Working for an interest.*—A contract by which a party agrees to superintend the driving of a tunnel, for an interest therein, does not constitute him a partner with his employers. *Barber v. Cazalis*, 2, 634
27. *Evidence of the partnership relation.*—An application for shares and payment of the first deposit in a joint stock oil company, does not constitute one a partner, where he has not interfered with the concern; nor is the insertion of his name, by the secretary, in a book of the company, containing a list of the members, a holding of him out to the public as a partner; but if he act as a member or director, attend meetings, or otherwise give himself out as a member, he will make himself liable, though there may be some want of the necessary formalities, or acts, to make him legally a member. *Hedge's App.*, 11, 463
28. *Subscription to stock does not create partnership.* *Id.*
29. *The meeting of some of the subscribers to organize their company and enter into the actual relation of members to it,* binds none but those who meet. *Id.*
30. *The purchase of a leasehold interest, as part of a stock in trade,* is not evidence of an agreement of partnership commensurate with the duration of the lease. *Crawshay v. Maule*, 11, 323
31. *Connecting telegraph lines are not partners.* *Baldwin v. U. S. Co.*, 3, 70
32. *Contract between quarry and marble mill construed to create a partnership.* *Rutland Co. v. Ripley*, 3, 291

B. Powers—Liabilities.

33. *Proof of authority of member to contract.*—In non-commercial partnership, one who seeks to hold the firm bound upon a contract

PARTNERSHIP—Powers—Liabilities. *Continued.*

made by a single member, must be able to show either express authority or such facts as will warrant the implication of authority from his copartners. *Butterfield v. Beardsley*, 11, 495

84. *Burden of proof of authority to bind firm.*—In such case the burden of proof as to authority to bind the firm, lies affirmatively upon the plaintiff to show such authority. *Id.*

85. *Mining, a non-commercial partnership.*—The above rules applied to a company organized to buy and work mines, as belonging to the class of non-commercial partnerships. *Id.*

86. *Each mining partner has authority to hire labor* and to bind the firm for its payment. *Nolan v. Lovelock*, 9, 860

87. *A managing partner has authority* to defray all necessary and proper expenses incidental to the beneficial working of the concern out of the joint profits derived from the sale of the product. *Roberts v. Eberhardt*, 11, 801

88. *Power of superintendent to bind partnership.*—A superintendent must have special authority for that purpose, or his acts must be afterward ratified, otherwise the partnership will not be bound. *Jones v. Clark*, 11, 478

89. *Acts of superintendent afterward ratified—Estoppel.* *Id.*

40. *Usage of the firm—Mode of contracting.*—The recognized and established usage on the part of the firm should be taken as a part of the contract of partnership. *Taylor v. Castle*, 11, 484

41. *The power to purchase materials* for the use of the mine does not imply the power to execute a note bearing interest. *Skillman v. Lachman*, 11, 881

42. *Managing adventurer no power to borrow on firm-credit*, but may do so under circumstances. *Brown v. Kidger*, 11, 848; *Ricketts v. Bennett*, 11, 278

43. *General power of partner.—Dormant partners.*—Each member, including dormant members, of a mining co-partnership, has power to bind the company by any contract within the scope of the partnership, and is a general agent of his co-partners for such purpose. *Burgan v. Lyell*, 11, 287

44. *The members of a mining company have authority* by law (in the absence of any proof, of a more limited authority) to bind each other by dealings on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of mines. *Tredwen v. Bourne*, 11, 268

45. *Ratification by partner.*—When an act is done for the benefit of a partnership, a subsequent ratification of it during the partnership by one of the members, is a ratification by all. *Lyell v. Sanbourn*, 1, 313

46. *Sale by partner valid unless fraudulent* or in violation of an agreement or term of the partnership; and if the party with whom he deals knows the fact, courts will not interfere. *Boswell v. Green*, 2, 863

47. *Restricted power of member of ditch company.*—By virtue of such membership, one has no general authority to bind the company by his contracts. *McConnell v. Denver*, 11, 482

PARTNERSHIP—Powers—Liabilities. *Continued.*

48. *Power of superintendent of ditch company.*—The superintendent or managing agent of such company has no authority to bind the company by a note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or may be implied from his acts recognized by the company with full knowledge. *Id.*

49. *Liability of incoming partner* does not include contracts and engagements made prior to his entry. *Babcock v. Stewart*, 11, 447

50. *Liability personal to the debtor.*—Those who have sold goods or done work on the credit of the original partners and have no lien, have parted with all their interest in the effects, and can look only personally to those with whom they have contracted. *Id.*

51. *The ground of liability of one partner for the acts of the others* is that of an implied general partnership agency. *Id.*

52. *Holding out as partner.*—If one holds himself out, or knowingly suffers himself to be held out, as a partner, on the faith of which others trust or enter into a contract with the firm, he is responsible, although not a partner. *Kirk v. Hartman*, 11, 450

53. *Holder of share not ipso facto liable.* *Vice v. Lady Anson*, 11, 244

54. *Liability of withdrawing partner—Notice.*—An *ex-partner* is not liable for new contracts with parties who do not know at time of contracting that he has withdrawn, there being no sufficient evidence that he had ever, while a partner, represented himself as such to the contracting party, or appeared so publicly in that character that it must have been presumed to be known. *Carter v. Whalley*, 11, 263

55. *Evidence to prove partnership liability.*—Where a mining company was formed on a capital of £30,000, in 8,000 shares, and 2,000 shares only were actually subscribed for, of which the defendant took 100: *Held*, that letters subsequently written by him to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied to the mines on the order of the directors. *Tredwen v. Bourne*, 11, 268

56. *Belief of plaintiff that retiring member was still a partner.*—If plaintiff was aware of the previous copartnership, and had no knowledge of the dissolution, and was misled by the acts of the retiring partner, and induced to deal with the firm upon the belief that the retiring partner was still a member of the firm, it would not be incumbent upon her to show "that she would not have so dealt but for that belief." *Hixon v. Pixley*, 11, 555

57. *Lapse of time as affecting knowledge of dissolution.* *Id.*

58. *Continuing liability of partner after conditional notice.*—*Held*, that a partner may by absolute notice save his liability although he still continues a partner; but that this was not an absolute notice in terms, and its effect should have been left to the jury. *Vice v. Fleming*, 11, 241

PARTNERSHIP—Powers—Liabilities. *Continued.*

59. *Agreement to purchase on joint account. Purchase perfected by one. First Nat. Bank v. Bissell,* 11, 546
60. *Arrangement between quarry and marble mill—Test of partnership—Book account for indorsements. Flint v. Eureka Co.,* 11, 588
61. *Use of unusual firm name by partner in signing note.*—The proper question for the jury is, whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner. *Faith v. Richmond,* 11, 265
62. *Idem—Facts of the case.*—So held where a partner in "The Newcastle and Sunderland Wall's End Coal Company" drew a note in the name of "The Newcastle Coal Company," and made it payable at a bank where the first mentioned company had no account. *Id.*
63. *Liability of general partners for trespass of employes. McKnight v. Ratcliff,* 11, 364
64. *A special partner is not so liable (under limited partnership act); facts not sufficient to change a special into a general partner. Id.*
65. *Silent dissolution as affecting liability of withdrawing partner.*—He is not relieved from liability for work done before, or debts contracted after thus silently withdrawing or assigning. *Burgan v. Lyell,* 11, 287
66. *Secret agreement limiting power of partnership, does not affect acts customary to partners, unless the parties dealt with knew of the agreement. Nolan v. Lovelock,* 9, 860
67. *The majority in interest, and not the majority of persons, has the right of control in the working of claims where all parties can not agree. Dougherty v. Creary, 1, 86; Nolan v. Lovelock,* 9, 860
68. *The abuse of such right affords grounds for relief in equity. Dougherty v. Creary,* 1, 86

C. Funds—Assets—Assessments.

69. *That legal title to common fund stands in third parties, is of no consequence in a controversy over the distribution of the proceeds of the sale of the property authorized by the general consent. Butterfield v. Beardsley,* 11, 495
70. *Purchase of coal lands by one partner with partnership funds—Conveyance compelled. Faulds v. Yates,* 3, 551
71. *A dissolution being to the interest of all the parties, costs and counsel fees allowed out of the fund. Von Schmidt v. Huntington,* 6, 285
72. *All property of a trading concern, whether real or personal, is partnership assets, and is to be so applied. Fereday v. Wightwick,* 11, 247
73. *Net profits defined. Binney v. Ince Hall Co.,* 11, 410
74. *Distribution of profits set apart as continuing capital.*—Circumstances considered under which net profits may, at the wish of

PARTNERSHIP—Funds, etc. Continued.

the majority of the shareholders, be applied in repayment of contributed capital, although the deed of settlement seems to contemplate a continuing capital, as in an ordinary partnership; there being, however, no express prohibition in the deed. *Id.*

75. *Lands that are part of common partnership stock have in equity the character of personalty; and the legal title thereto is subordinated to the incidents of partnership funds and accounting. Godfrey v. White,* 11, 563

76. *Lands as assets.*—Partnership lands can not, in Michigan, be distinguished from other assets for purposes of settlement. *Id.*

77. *Sale of partnership property for individual debts can cover only the individual interest of the debtor, which can be determined only by an account of the partnership affairs. Ward's Appeal,* 5, 666

78. *Real estate, not partnership property. Grubb's Appeal,* 3, 416

79. *Forfeiture of share—Burden of proof on forfeitor although defendant. Patterson v. Silliman,* 11, 327

80. *Assessments of mining interests.*—The statute of 1865-6, California, in relation to levying assessments against the owners of interests in mining claims for the purpose of working the same, applies only to co-partners in the claim, and has no reference to mere owners and shareholders, without the partnership relation. *Brundage v. Adams,* 11, 470

81. *Idem.*—To warrant such assessment, if the partnership relation does not exist, the joint owner must be notified that henceforward he will be deemed a co-partner for the purpose of working the claim, and the service of the notice changes the relationship of the parties, and creates a mining partnership. *Id.*

D. Limited—Special.

82. *Distinction between corporate and partnership liability. New York Mine v. First Nat. Bank,* 1, 453

83. *Special partners.*—In a suit against two as partners on contract, the question would be whether they were partners in that contract. General partnership is immaterial. *Kirk v. Hartman,* 11, 450

84. *Private arrangement between partners.*—The rule that third parties are not affected by private agreement existing between partners without notice thereof, rests upon the custom of merchants alone. *Judge v. Braswell,* 11, 508

85. *Partnership note—Strict partnership by agreement between mining partners. Decker v. Howell,* 11, 493

86. *Partners may by contract limit their powers inter sese,* but such limitation does not bind strangers having no notice thereof. And such limitation and notice must be specially pleaded. *Burgan v. Lyell,* 11, 287; *Manville v. Parks,* 15, 565

E. Mining Distinguished from Other Partnerships.

87. *Mining and ordinary partnerships distinguished. Duryea v. Burt,* 11, 395; *Charles v. Eshelman,* 2, 65

88. *Incidents of mining partnerships.*—A mining concern differs

PARTNERSHIP—Limited—Special. *Continued.*

from a common partnership in that—1. The shares are assignable.
 2. The death or bankruptcy of a holder of shares does not operate as a dissolution although it is in the nature of a trading concern.
Fereday v. Wightwick, 11, 247

89. Mining partners have power to bind each other by dealings on credit for the working of the mine. *Manville v. Parks*, 15, 565

90. A mining partnership differs from an ordinary partnership, in certain incidents, to wit: *inter alia* (1) the sale of his interest by one partner does not dissolve the relation; (2) no one partner can bind the company by note or contract of indebtedness in the name of the company. *Skillman v. Lachman*, 11, 381

91. A purchaser becomes a partner. *Nisbet v. Nash*, 11, 531; *Taylor v. Castle*, 11, 484

92. *No delectus personæ in mining partnerships.*—It is well established that in mining partnerships there is usually no *delectus personæ*, and because of this peculiarity the partnership is not dissolved by the death of a partner, nor as a consequence of a sale of an interest by a partner to a stranger. *Taylor v. Castle*, 11, 484; *Charles v. Eshelman*, 2, 65

93. The powers of members and managers of mining partnerships are limited to the performance of such acts in the name of the partnership, as may be necessary to the transaction of the business, or which is usual in like concerns. *Charles v. Eshelman*, 2, 65

94. No power to bind associates to payment of counsel. *Id.*

95. Adventurers testing a prospect under an option contract, are partners. *Manville v. Parks*, 15, 565

96. A mining partnership exists where several parties co-operate to work a mine, and ownership of the mine is not essential. *Id.*

97. A partnership may be implied from the acts of the parties without express contract. *Id.*

98. The relation implied by jointly conducting a mining venture, even without partnership agreement. *Snyder v. Burnham*, 15, 562

99. No right of pre-emption between mining partners. *First Nat. Bank v. Bissell*, 11, 546

100. Conveyance of entire interest by partner, may be made without dissolving the "partnership." *Kahn v. Central Co.*, 11, 540

101. *Insufficient finding as to partnership.*—In a suit to compel an account for the proceeds of a mining claim, a finding by the court that there was no such co-tenancy between the parties in the mine in controversy, as to entitle the plaintiff to an accounting, is a mere legal inference, and not a sufficient finding of fact upon which to base a decree. *Id.*

102. *Payments of debts of deceased partner* must be made out of the proceeds of the joint estate, and the individual debts out of the proceeds of the separate estate. In the exercise of equitable jurisdiction in the allowance of claims, county courts are strictly restrained from infringing on this rule. *Charles v. Eshelman*, 2, 65

PARTNERSHIP. *Continued.***F. Dissolution—Survivorship—Accounting.**

103. *By the general rule as to dissolution*, the partnership may be terminated at a moment's notice by either party. *Crawshay v. Maule*, 11, 223
104. *Death terminates a partnership.* *Crawshay v. Maule*, 11, 223; but see *Jones v. Clark*, 11, 474
105. *Upon final dissolution of trading partnership*, the court will order a sale on motion. *Crawshay v. Maule*, 11, 223
106. *Want of co-operation by partner distinguished from interference—Receiver—Dissolution.* *Roberts v. Eberhardt*, 11, 301
107. *Accounting sought by deserting and insolvent adventurers.* *Rhea v. Vannoy*, 11, 315
108. *Limitation of account.*—All that abandoning partners could ask, would be an account of the moneys received on the disposition of the land, and for any tolls, rents or profits arising out of the mining or other operations of the adventure. *Id.*
109. *Abandoned partner operating on his own account*, can not be called to account by the abandoning partners. *Rhea v. Tatham*, 11, 321
110. *Lessee taking partner allowed to dissolve at will after accounting.* *Burdon v. Barkus*, 11, 357
111. *Desire to part.*—The mere desire of one of the co-tenants is sufficient to authorize the courts to grant a dissolution; that is not enough between partners. *Bradley v. Harkness*, 11, 339
112. *Assignment by one partner is no dissolution* of a mining partnership. *Duryea v. Burt*, 11, 395
113. *Division of property after dissolution.*—Upon the dissolution of a partnership, in which the articles provided that the effects, on dissolution, were to be equally divided among the partners, the property and effects of the firm belong to the individuals who composed it, as tenants in common; part of the former members of the firm can not dispose of the property of any other member, without his consent. *Phillips v. Reeder*, 11, 419
114. *Idem.*—If some of the members of a dissolved partnership dispose of the property of one of the partners, without his consent, he may at his option, call on them to account for its value. *Id.*
115. *Rights of retiring partner.*—In many cases, if some of the partners, after dissolution, continue the business with the property of the late firm, the retiring partner will be entitled to call on them for a share of the profits, as well as for his capital. *Id.*
116. *Idem—Continued use of retiring partner's effects.*—But this principle will not be applied to a case where the chief contribution to the business was personal skill and labor, and a new partnership was formed with strangers, merely because some of the property of the retiring partner was used in the new business, after being sold to the new firm by the continuing partners, without authority. *Id.*
117. *Idem—Accounting to retired partner* must be given if his property has been sold by the remaining partners. *Id.*

PARTNERSHIP—Dissolution, etc. *Continued.*

118. *No partition or accounting without dissolution.* *Nisbet v. Nash*, 11, 581
119. *One partner may at any time withdraw* and cause a technical dissolution of the firm, subject to liability to his partners if the act be wrongful. *Stemmer's App.*, 11, 487
120. *Cause of dissolution—Discretion.*—A wide discretion is vested in courts of equity upon questions relating to the dissolution of partnerships, but when irreconcilable differences exist, which preclude harmonious and successful operation of the business by the partners, a court of equity will decree a dissolution. *Id.*
121. *Idem—Preservation of the business.* *Id.*
122. *Parties—Retired partner.*—In a suit to dissolve a partnership and for an accounting, and to have a note held by the plaintiff paid out of the partnership assets, if a retired partner still continues bound by the note, he has nevertheless parted with his equity to have the partnership debts paid out of the partnership property, and if a proper party is certainly not a necessary party to the proceeding. *Jones v. Clark*, 11, 478
123. *Use of partnership capital after dissolution.*—All profits derived from such continued business, as they are part of the joint estate, are to be accounted for to all the partners or their representatives. *Waring v. Cram*, 12, 280
124. *Holding out as partner after notice of dissolution* compels the partner so doing to prove that knowledge of the dissolution came to the party asserting his liability. *Hixon v. Pixley*, 11, 555
125. *Idem—Old and new customers.*—If one partner, after the dissolution of the copartnership, consents that his name shall be held out to the world as a partner, all persons, whether new customers or not, will be presumed to deal with the firm upon this partner's credit as well as upon the credit of the other partner. *Id.*
126. *Clandestine profits* secured by one partner to the injury of the partnership, must in equity be accounted for. *Waring v. Cram*, 12, 280
127. *Misapplied capital and stolen time.* *Id.*
128. *Partner buying out partner while concealing outside offer.*—*Held*, that plaintiff was entitled to recover his proportion of the excess in price received for this claim. *Jennings v. Rickard*, 15, 624
129. *Partners buying in adverse claim and refusing benefit thereof to associate.* *Hirboar v. Reeding*, 11, 514
130. *Quarry works prosecuted—Successive parties in interest—Partnership continued by acquiescence of heirs—Necessity of demand to dissolve before suit.* *Duffield v. Bratnerd*, 11, 526
181. *Rule of distribution between the late associates.* *Butterfield v. Beardsley*, 11, 495; *Fletcher v. Hawkins*, 11, 290
182. *Jurisdiction not affected by locus rei sitæ.*—Proceedings between partners for an accounting, are always for the principal purpose of reaching a statement of money balances and a division of assets as personalty, and being essentially a personal and not a real controversy, may be carried on in courts within whose jurisdiction the

PARTNERSHIP.—Dissolution, etc. *Continued.*

parties live and do business, irrespective of the *locus* of the partnership lands. *Godfrey v. White*, 11, 563

183. *Failure in duty as a partner* may be a ground for dissolution, but not for compensation to other partners. *Id.*

184. *Interest can not be allowed at an unusual rate* on an accounting, if there has been no written agreement for that rate. Advances by partners for the benefit of the business do not draw interest unless an intent that they shall do so can be inferred from usage or from circumstances, or unless it is understood by the partners that it shall be allowed. *Id.*

G. Suits, by, between, and against.

185. *Partner can not sue partner.* *Bullard v. Kinney*, 11, 813

186. *Reasons for the rule* forbidding suit by partner against partner except in certain restricted cases. *Id.*

187. *An action at law may be maintained by one partner against the other* for a balance due him growing out of the partnership transaction, if there be but a single item to liquidate. *Musier v. Trumppour*, 11, 260

188. *Suit by partner upon note of copartner.*—*Held*, that the note was not a partnership note, and the fact that the money raised upon it was applied to the payment of debts of the association, presented no obstacle to the suit by C. *Crater v. Binger*, 11, 487

189. *Partner against partner upon segregated item of demand.*—An action by one partner will lie against his copartner, if the contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts. *Crater v. Binger*, 11, 487; *Slater v. Haas*, 16, 201

140. *Parties to action between mining partners.* *Settembre v. Putnam*, 11, 425

141. *In a suit against partners* an item of debt due by the defendants and others jointly, can not be recovered. *Nolan v. Lovelock*, 9, 360

142. *Joint liability of individual and association.*—If an individual is employed by an association to examine mines, a person who acts with the association, though his name is not signed to the articles of association, may become jointly bound with the members for such services. *Boyd v. Merriell*, 9, 664

143. *One partner liable, all liable.* *Ashworth v. Stanwix*, 9, 674

144. *Retiring and incoming partners as parties.* *Fawcett v. Whitehouse*, 11, 250

145. *Action between shareholders in ditch.*—The shareholders in the ditch may be regarded as partners entitled to participate in the profits derived from the business of carrying on the ditch, and the money used be considered as money had and received by the defendants to the plaintiff's use. *Abel v. Love*, 11, 350

146. *Partner may bid at sale of partner's interest.*—*Bradbury v. Barnes*, 11, 334

147. *No fiduciary relation in such case.*—The rule controlling action

PARTNERSHIP—Suits, etc. *Continued.*

of trustee toward his fiduciary does not apply against such purchase. *Id.*

148. *Facts taking case out of the general rule.*—But where, while he has in his hands large funds of the company, he causes to be bought in, in the name of third parties, judgments against the company or a tax title, he will be presumed to have so bought to protect the company, and his associates are bound to him in contribution only. *Id.*

149. *Evidence in proof of partnership—Admissions.*—When a defendant is charged in debt as a member of a mining company; but is not shown to have contracted such debt personally, nor to have represented himself to the plaintiff as a partner, the fact of his having been partner may nevertheless be shown by evidence, short of strict proof that he signed the deed of partnership, or was legally interested in the mine. Admissions made by him before or after the debt was incurred may be evidence for this purpose. *Ralph v. Harvey*, 11, 273

150. *Suit on company note by holder of company scrip.*—A plaintiff who is a holder of scrip, but not a registered shareholder in a mining company, has but an inchoate right of partnership in the company, and not a perfect right, and is not thereby disqualified from bringing suit upon a note of the company. *Fox v. Frith*, 11, 277

151. *Specific relief against partner—Misrepresentation.*—In a suit between partners to compel the conveyance of land, it will be granted only upon the specific terms of the agreement for the purchase; and if the purchasing partner states that he paid a larger price than in reality he did pay, and thereupon his co-partners advance more than their proper proportion of the purchase money, the partner, making such misrepresentations, can not, in such a suit, be compelled to refund the excess. *Faulds v. Yates*, 3, 551

152. *Parties.*—In such a suit the corporation is neither a necessary nor proper party. *Id.*

153. *Party to action—Day in court—New trial.*—In an action to foreclose a mechanic's lien against Hall and others, composing the firm of the San Gorgonio Fluming Co., a corporation answered and judgment was rendered against it. *Held*, that the corporation had never been made a party to the action, and had not had its day in court, and that a motion for new trial was erroneously denied. *Rousseau v. Hall*, 4, 116

154. *Constitutionality of California Partnership Act.*—The question of the constitutionality of the act providing for forced sale of partnership interests without contract or judicial process, suggested by the court, but not considered. *Brundage v. Adams*, 11, 470

155. *Distribution among money shares and labor shares.*—The holders of the money shares had contributed money, and paid the transportation of the holders of the labor shares, who as yet had contributed no labor or other consideration: *Held*, that in such case the entire effects should be distributed to the holders of the money shares alone. *Von Schmidt v. Huntington*, 6, 284

PATENT.

1. *A State patent for land* is taken subject to the vested and accrued water rights of others under the act of Congress. *Barnes v. Sabron*, 4, 674. The same as to railroad grants. *Broder v. Natoma Co.*, 5, 33
2. *Conflicting rights of appropriator of water and patentee of land.* *Osgood v. El Dorado Co.*, 5, 37
3. *Fraud in obtaining patent.*—A patent which has been obtained from the United States by fraud can only be attacked by the United States. *Meyendorf v. Frohner*, 5, 561; *Boggs v. Merced Co.*, 10, 334
4. *The Ditch Act construed with reference to prior patents.* *Union Co. v. Ferris*, 8, 91
5. *Riparian rights before patent—Act of July 26, 1866.*—One who has entered and paid for land and received a certificate of purchase, but no patent, is yet entitled to claim and exercise riparian rights; and so, too, of one who has entered land under the Homestead Act, and one who entered and paid for his land prior to the passage of the act of Congress of July 26, 1866, is not affected by it. *Union Co. v. Dangberg*, 8, 113
6. *A patent of a mining claim based upon a location made under the act of 1866*, grants the government title to the surface ground mentioned therein, subject to the rights pertaining to other locations made prior to the act of May 10, 1872. *Blake v. Butte M. Co.*, 9, 503
7. *Senior patent on junior location.*—The holder of an elder location failing to adverse the application for patent made by the holder of a junior location, waives his priority. And, if he ever afterward apply for patent, his patent is subject and junior to the patent issued on the prior application. *Eureka Co. v. Richmond Co.*, 9, 578
8. *The patent of the United States* "is something upon which its holder can rely for peace and security." The presumption is that it was duly issued. *Id.*
9. *Effect of end lines.*—The holder of a patent can not claim any part of the vein on its strike beyond his end line, extended vertically downward. *Id.*
10. *Idem—Necessity of this construction.* *Id.*
11. *Patent can not be collaterally attacked for fraud.* *Boggs v. Merced Co.*, 10, 334
12. *Patent conflicting with vested rights.*—Individuals can only resist the conclusiveness of a patent by showing that it conflicts with prior vested rights. *Id.*
13. *Parties in bill to set aside patent.*—It is a fatal objection to a bill in equity to set aside a patent for fraud in its procurement that the patentee is not a party. *Id.*
14. *Method of determining who is entitled to patent.* *420 M. Co. v. Bullion Co.*, 11, 608
15. *Application for patent—A proceeding in rem.*—Proceedings to procure a United States patent should be regarded as a proceeding in rem conclusive upon all the world. *Id.*
16. *Idem—Res adjudicata.*—The doctrine of *res adjudicata* should

PATENT. *Continued.*

be rigorously applied to the litigation brought to test the right to the issue of a patent. *Id.*

17. *Possessory claim can not defeat patented title.* *Fremont v. Seals*, 11, 633

18. *Locator not compelled to patent.*—There is nothing in the mining act imposing an obligation on the locator of a claim to proceed and enforce a patent. *Gold Hill Co. v. Ish*, 11, 635

19. *Facts of the case—Agricultural patent void as against pre-existing mining claim.* *Id.*

20. *"Known mineral deposits"*—*Notice of possession.*—Open and notorious possession (by mining) is sufficient to charge an applicant for patent with notice of the mineral character of land and to bring such land within the description of "known mineral deposits." *Id.*

21. *Recitals of fact and conclusions of law in patent.*—The officers of the government and the grantee, as well as those in privity with him, are bound by the recital of facts contained in the patent of the United States; but an opinion of the executive officers in respect to matters of law, as indicated either by the ultimate act of issuing the patent or by recitals inserted in that instrument, is not conclusive. *McGarrahan v. New Idria Co.*, 11, 641

22. *Patent must be based on statute.* *Id.*

23. *Void patent based upon Mexican grant not confirmed.* *Id.*

24. *Patent after suit brought.*—A patent from the government to the defendant for the premises in dispute, issued after the commencement of the suit, must be pleaded by a supplemental answer. *Kahn v. Old Telegraph Co.*, 11, 646

25. *Location certificate in aid of patent.*—As a location notice in the acquisition of mineral lands is the first step in that direction, the same is proper evidence in connection with the patent to show the claim to which the patent refers. *Id.*

26. *A patent may be attacked at law where void on its face or issued without authority*, or against authority, or where the government had no title; but where the government had title and it passed by the grant, it can not be attacked at law upon the pretense either of fraud or superior equities. *Id.*

27. *The want of authority which will make a patent void*, is a total want of authority to issue the same for the subject of the grant. *Id.*

28. *Scope of a mining patent.*—A patent to a mining claim passes whatever title the government had to the surface, and any vein or veins beneath it not otherwise granted; and its issuance presumes a compliance with the mining laws. *Id.*

29. *The record in the General Land Office of a patent from the United States is evidence of a grant, but is not the grant itself.* If the instrument as recorded is sufficient on its face to pass the title, it is to be presumed that the grant has actually been made; but if it is not sufficient, no such presumption arises. The public records of the executive departments of the government are not like those kept pursuant to ordinary registration laws, intended for notice, but for preservation of the evidence of the transactions of the department. *McGarrahan v. New Idria Co.*, 11, 665

PATENT. *Continued.*

80. *Patent relates back.*—A patent of the United States to a mining claim relates back to the time of the original location. *Heydenfeldt v. Daney M. Co.*, 13, 204

81. *Patent construed by act of Congress—District rules are subordinate.* *Wolfeley v. Lebanon Co.*, 13, 233

82. *Record of patent not countersigned, not evidence.* *McGarahan v. New Idria Co.*, 11, 665

83. *Exemplifications of records as evidence.*—The countersigning of the patent is not dispensed with by the act of March, 1843, which provides for exemplifications of records to be used as evidence. Under this act the names need not be fully inserted in the record; if they are partially inserted in the record it will be presumed that they fully appear in the patent; but no such presumption will be raised if no signature is shown by the record. *Id.*

84. *Failure to record does not defeat patent.* *Id.*

85. *Patent not to be attacked in court of law.* *St. Louis Smelting Co. v. Kemp*, 11, 673

86. *Remedy in equity for wrongful issuance.* *Id.*

87. *A stranger to the title can not complain of the action of the government with respect to such title.* *Id.*

88. *Placer patent for over 160 acres upheld—Impeachment by showing irregularities in land office not allowed.* *Id.*

89. *Patent conveys minerals.*—The patent of the United States passes to the patentee all the interest of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed or fixed to its surface; in fact, in everything embraced within the term "land." *Moore v. Smaw*, 12, 418

40. *Patent construed as deed.* *Id.*

41. *Patent contrary to reservation.*—A patent for a saline which was, under the general law, reserved from sale, is void. *Morton v. Nebraska*, 12, 451

42. *Inception of title.*—An application for land is not an inception of the title until it is filed in the land office and the office fees and purchase money paid to the Commonwealth. *Baker v. King*, 14, 404

43. *Priority among applicants.*—A person had an application made out for land, and afterward, on the same day, another person had an application prepared for the same land, and while about having it prepared, he was informed of the previous application; the application of the second person was first filed in the land office: *Held*, that if there was no fraud or deception on his part, his warrant was entitled to prevail over the warrant issued on the application first prepared but last filed. *Id.*

44. *Rights of bona fide purchaser in such case, protected.* *Id.*

45. *Patent over ditch-head after appropriation.*—A settler before patent had diverted water from a natural stream; afterward the land covering that portion of the stream from which his flow was led was patented to another: *Held*, that he acquired no right to the water as against the United States or its grantee. *Vansickle v. Haines*, 15, 201

PATENT. *Continued.*

46. *The flow of water is an incident to the soil and goes with the land to the patentee. Id.*

47. *Effect of execution sale of mine pending application for patent. Hamilton v. Southern Nevada Co.,* 15, 814

48. *Title between entry and patent.*—A party having paid the purchase money, and received the certificate of purchase, is the owner of the land. The United States has ceased to have any pecuniary interest in it. It holds the naked, dry, legal title for the holder of the certificate. *Id.*

49. *Such a certificate of purchase can not be collaterally assailed. Id.*

50. *Courts will not review the action of the land department as to the issue of a mining patent, except in case of fraud or mistake of law. Jeffords v. Hine,* 15, 575

51. *Patent carries back to entry.*—Where land is entered and paid for, and the receiver's receipt issued, the United States retains no real interest in the land; when the patent goes it relates back to the date of entry, and all claims intervening between entry and patent are cut off. *Pacific Co. v. Spargo,* 16, 75

52. *An agricultural patent carries all mines and minerals within its bounds, unless specially excepted from the grant. Id.*

53. *Patent set aside only for gross irregularity. U. S. v. Marshall Co.,* 16, 205

54. *Scope of bill to vacate patent.*—A bill in chancery brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere retrial of the case before the land office. *Id.*

55. *Presumption of regularity in issuance of patent. Id.*

56. *Government a trustee for the locator.*—One who has made application for patent on his claim in the land office and has complied with all preliminary requirements without meeting any adverse claim, is the equitable owner of the land and the Government holds the title in trust for him. *Dahl v. Raunheim,* 16, 214

57. *Where two parties have patents for the same tract of land, and the question in a judicial proceeding is as to the superiority of title under those patents, and the decision depends upon extrinsic facts not shown by the patents, it is competent to establish it by proof of those facts. Iron Co. v. Campbell,* 16, 218

PAYMENT.

1. *Voluntary payments, by one having the means of knowing, his rights, it seems, can not be recovered back. Irvine v. Hanlin,* 14, 242

2. *Creditor can not retain conditional payment and avoid the condition.*—If, pending the adjustment of a disputed liability, the debtor transmit money to his creditor as a payment in full of the demand, the creditor may not receive and retain the money as a credit upon a larger sum claimed by him, without discharging the debtor as to the whole. *Washington Co. v. Johnson,* 16, 165

PERSONAL LIABILITY.

1. *Of directors.*—Directors do not become personally liable for the fraud and misrepresentations of the active managers of a corporation from the mere fact of their holding such office in the company. Knowledge of or participation in the guilty act must be brought home to the person charged. *Arthur v. Griswold*, 7, 46

2. *Fraud of associates* does not fix liability on an agent or trustee having no part in it. *Id.*

3. *Trustees of stock—Liability—Witness.*—A person who holds stock upon the books of a water company and holds an office, viz., that of secretary, to which stockholders only are eligible, although he holds the stock only in trust for another, is responsible for the debts of the company, as a stockholder, and therefore disqualified as a witness for the company. *Wolf v. St. Louis Co.*, 10, 653

4. *Directors' contract securing purchase money.*—By a deed which recited that defendants, the directors of a mine company, had purchased a mine for £4,500, to be paid within a twelvemonth out of the moneys to be raised by the company, with a proviso that the directors should be allowed six months further time, in case the bankers of the company should not within the twelvemonth have received sufficient deposits from the subscribers to enable the directors to pay thereout, the directors covenanted that out of the payments so to be made by the subscribers, they would pay the purchase money, at time specified, subject to the aforesaid proviso: *Held*, that the directors were personally responsible at the expiration of the eighteen months. *Hancock v. Hodgson*, 11, 698

5. *What stockholders liable for debts* under the charter of a mining company. Only such as were stockholders when the debts were contracted. *Moss v. Oakley*, 12, 1

6. *Presumption that note was coeval with debt.*—In a suit brought against a stockholder after judgment recovered upon a promissory note given by the company, the note will be presumed to have been made when the debt was contracted until the contrary be shown. *Id.*

7. *Presumptions after judgment.*—The judgment against the company is at least *prima facie* evidence of the validity of the note, under such circumstances; and *quære*, whether the defendant will be allowed to impeach either note or judgment except for fraud. *Id.*

8. *Personal liability of corporators.*—In California each member of an incorporated company is answerable, personally, for his proportion of the debts and liabilities of the company. *Mokelumne Co. v. Woodbury*, 12, 6

9. *Idem—Nature of liability.*—Each corporator is a principal debtor, and not a mere surety for the corporation, and in relation to the creditors of the corporation, stands on the same footing as if it were an ordinary partnership. *Id.*

10. *Merger of debt in judgment.* *Handerhan v. Cheshire Works*, 12, 9; *Byers v. Franklin Co.*, 12, 97

11. *Neglect to make the report* required by sections 5, 18 or 19, or neglect to file it in any of the requisite places, will be presumed to be in-

PERSONAL LIABILITY. *Continued.*

tentional, and such neglect unexplained, renders each director liable for all debts of the corporation contracted during the period of such neglect. *Van Etten v. Eaton*, 12, 19

12. *Object of legislature in requiring reports* was to secure accessible means of information respecting the financial condition of the corporation. *Id.*

13. *Individual liability of corporators.*—When the charter of a corporation provides that where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders, and when, while they were such, they were guilty of such neglect, and in the meantime the corporation became indebted to the plaintiff by note: *Held*, that he might maintain an action of debt therefor against such delinquent officers. *Union Co. v. Pierce*, 12, 19

14. *Reports of officers.*—Where the charter of a corporation required its officers annually, between the 1st and 20th of January, to make and publish a certain report, *held*, that a company incorporated in May, 1867, was bound to make and publish such report in the following January. *Id.*

15. *A mining corporation is not a manufacturing corporation.* *Byers v. Franklin Co.*, 12, 27

16. *Liability enforced in equity.*—By statute, a creditor of a mining corporation may maintain a bill in equity against the officers of the corporation who are liable for its debts. *Id.*

17. *Acceptance of draft for accommodation.*—A debt due from a corporation to one who has accepted the company draft for its accommodation, and who paid it at maturity, is a debt contracted at the time of acceptance. *Id.*

18. *The liability statutory—Strict proof and construction.* *Steele v. Dunne*, 12, 89; *In re South Mtn. Co.*, 13, 615

19. *The mere fact that the defendant was a director* in such a company is not sufficient to make him liable individually within the meaning of the statute. *Steele v. Dunne*, 12, 89

20. *Liability of stockholder where company has re-organized.* *Id.*

21. *Liability of holder of stock paid for with property.*—The petition of a creditor of the La Motte Lead Co., which had become insolvent and dissolved, was held not sufficient to open an inquiry into the transaction between the corporators and the company as to the value of the property conveyed to the company in payment of shares with a view to hold a share owner for the difference between the agreed value and the actual value of the property conveyed. *Phelan v. Hazard*, 12, 42

22. *Individual liability under statute and constitution* for labor debts imposed on stockholders means a liability beyond that of members of the corporation, and does not refer to their several liabilities. The legislature may prescribe the means of enforcing it. *Milroy v. Spurr Mtn. Co.*, 12, 53

23. *Joinder of parties.*—Act 118 of 1877, authorizes suits for labor debts to be brought against a corporation alone or jointly with one or

PERSONAL LIABILITY. *Continued.*

more of the stockholders. And where a claimant has elected to sue the corporation alone and has recovered judgment, he can not afterward bring his action on the same debt or upon a claim including it, against the corporation and stockholders, jointly or conversely. *Id.*

24. *Unless joined with the corporation as co-defendants.*—An action for labor debts brought under act 118 of 1877, can not be maintained against stockholders. *Thompson v. Jewell*, 12, 59

25. *Failure to deny personal liability.*—In an action against a corporation, in which certain persons are summoned as stockholders, the omission by them to file an answer specifically denying the allegation that the corporation had omitted to comply with the requirements of the statute, whereby the stockholders were made liable for the corporate debts, does not operate as an admission of that fact. *Taylor v. New England Co.*, 12, 107

26. *The burden is upon the plaintiff* to show that the persons whom he has summoned as stockholders are liable for the payment of the debts of the company. *Id.*

27. *Personal liability of outgoing stockholder.* *Taylor v. New England Co.*, 12, 107; *Williams v. Hanna*, 15, 78

28. *Limitation of personal liability* is the policy of the Companies Act regarding adventurers. *Baglan Hall Co., In re* 13, 261

29. *Assertion of corporate solvency creates no personal liability.* *Searight v. Payne*, 13, 401

30. *Pursuing stockholders when officers have property.*—A stockholder in a mining company can not defend himself from judgment in an action against himself, impleaded with his corporation, under Stat. 1851, C. 815, by showing that the officers of the corporation have sufficient property to pay the judgment. *Brayton v. New England Co.*, 13, 458

31. *Liability of stockholder for assessments.*—A stockholder, who was not one of the original subscribers to a mining corporation organized under the general mining law, is liable, the same as an original subscriber, for any balance due upon assessments, after applying the proceeds of stock sold for default. *Merrimac Co. v. Bagley*, 13, 461

32. *Personal liability not contingent on a recovery against the corporation.* *Davidson v. Rankin*, 13, 473

33. *Idem—Liability of executors—Bar.*—It follows that it was, in the case of a decedent, a debt due at the time of his decease, and that neglect for the period limiting the presentation of claims due at his decease, will forever bar action. *Id.*

34. *Parties in personal liability suits.*—Under the Manufacturing Company Act of July 18, 1868, a bill can not be filed against the corporation and the officers, to enforce the individual liability of the latter, but against the officers only. *Sheriff v. Globe Co.*, 13, 475

35. *The bill must be filed by the creditors* in behalf of themselves and all other creditors of the corporation. *Id.*

36. *No personal liability for assessments.*—The act of July, 1863, (for incorporating mining companies) does not make a transferee of

PERSONAL LIABILITY. *Continued.*

stock personally liable to pay assessments. *Frank's Oil Co. v. McCleary*, 13, 477

87. *Personal liability statute not enforced extra-territorially.* *First Nat. Bk. v. Price*, 13, 485

88. *Parol agreement to waive personal liability.* *Bassett v. Forbes*, 13, 530

89. *Personal liability of trustee—Proof of acceptance of trust.*—The mere election of a trustee, under the general act for the formation of manufacturing and mining companies, does not render him liable for the debts of the corporation because of a failure to comply with the law; there must be evidence of an express or implied acceptance of the office. *Cameron v. Seaman*, 13, 584

40. *Annual report—Filing of, after set period.*—Under the act requiring the company annually, within twenty days from the first of January, to make a report, which shall be signed, verified, filed and published, the filing and publishing may be done after the twenty days have elapsed. (*FOLGER and RAPALLO, JJ., dissenting.*) *Id.*

41. *Corporation to be first pursued by a creditor.* *Ladd v. Cartwright*, 13, 607; *Milroy v. Spurr Mtn. Co.*, 12, 53

42. *Equity is the only proper forum for enforcing the personal liability of stockholders.* *Ladd v. Cartwright*, 13, 607

43. *General statement of the facts and proof necessary to fix personal liability upon a stockholder, with citation of the authorities by the court.* *South Mt. Co., In re*, 13, 615

44. *Liability under Sec. 349 of California code relating to the sale of delinquent stock.*—The stockholders are not personally liable for assessments unless from the terms of their subscription. *Id.*

45. *Effect upon stock.*—The statutory personal liability of stockholders of mining corporations does not affect the stock itself; and such liability does not, therefore, amount to a breach of warranty against incumbrances, upon a sale by a stockholder by whom such liability has been incurred. *Williams v. Hanna*, 15, 73

46. *Personal liability for over-issue of stock.*—Officers of a corporation, guilty of an over-issue of stock, are liable to those persons into whose hands the shares may come, the same as if they had been issued to the plaintiff directly. *Bruff v. Mali*, 3, 574

47. *Shifting burden of proof.*—In such action to recover the cost of such spurious shares, when the plaintiff has proved that the shares in question were not issued until after all the authorized stock had been issued, the burden of proof is upon the defendants to show that the shares were genuine, or were issued in lieu of genuine canceled shares. *Id.*

48. *Enforcing stockholders' personal liability; analogy to garnishee proceedings.* *Coalfield Co. v. Peck*, 13, 623

PERSONAL PROPERTY.

1. *Coal broken becomes personalty.* *Lykens Valley Co. v. Dock*, 3, 570

2. *Idem—Removal of loose coal by assignee subject to lessee's covenants.* *Id.*

PERSONAL PROPERTY. *Continued.*

3. *Rule as to severed personality.* *Noble v. Sylvester*, 12, 62
4. *Application of the rule.*—A stone split out from the ledge and intended for the construction of a tomb, left lying on the land more than thirty years after sale of the land, *held*, the personal property of the vendor. *Id.*
5. *Parol proof of exception—Continued assertion of claim.*—Property so severed and converted does not need to be specially excepted in the deed conveying the land; and the fact that a parol exception was made of such stone, was properly shown, as well as the statements of the party claiming to own the stone, when there was nothing in the position of the stone itself to show whether it belonged to that class of property which would, or of that class which would not, pass under the deed. *Id.*
6. *When severance complete.*—It is not to be considered as severed from the mass until it exists as the coal of commerce. *McLean Co. v. Lennon*, 10, 277
7. *Split stone lying on land, sold during statutory period.*—*Held*, that they remained the property of the original owner in the absence of any conversion or assertion of dominion by the vendee of the land in the meantime. *Baker v. Chase*, 12, 66
8. *Right to remove personality from land granted.* *Id.*

PLACERS.

1. *Placer may exceed 160 acres and cover several locations.* *St. Louis Smelting Co. v. Kemp*, 11, 673
2. *The size of placer claims may be limited by district rules.* *Rosenthal v. Ives*, 15, 324
3. *Patent for placer, including specified lode.* *Reynolds v. Iron Silver Co.*, 15, 591
4. *Lodes after discovered.*—Where no such vein or lode is known to exist, the patent for a placer claim shall carry all such veins or lodes within its boundaries which may be afterward found to exist under its surface. *Id.*
5. *But where a vein or lode is known to exist* under the surface included in such patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode. *Id.*
6. *Gravel deposit or stratum not a lode.* *Gregory v. Pershbaker*, 15, 602
7. *Placer claims include all forms of deposit excepting veins of quartz or other rock in place.* *Id.*
8. *Placer location without discovery.*—The location of a placer mining claim is valid, notwithstanding no valuable mineral had been actually discovered in the land before the location was made. *Id.*
9. *A placer patent does not pass title to a lode* discovered, located, and recorded before the date of the application for a placer patent; and it is immaterial whether or not the existence of such lode or of the location thereon was known to the placer applicant. *Noyes v. Mantle*, 15, 611

PLACERS. Continued.

10. *When a person applies for a placer patent in the manner prescribed by law*, the question whether it is placer ground is conclusively established and is not open to litigation by private parties seeking to avoid the effect of the proceedings. *Dahl v. Raunheim*, 16, 214

11. *A lode patent issued subsequent to the issue of a placer patent of a tract within whose metes and bounds the lode patent is located*, is not conclusive evidence that the lode was such a known lode at the time of the issue of the placer patent as to authorize the issue of a later patent for the lode itself. *Iron Co. v. Campbell*, 16, 218

PLEADING AND PRACTICE.

A—ADMISSIONS BY PLEADING.
 B—AMENDMENT.
 C—ANSWER.
 D—APPEAL.
 E—ASSIGNMENT OF ERROR.
 F—BILL OF EXCEPTIONS.
 G—CHANGE OF VENUE.
 H—COMMON COUNTS.
 I—COMPLAINT.
 J—CONTINUANCE.
 K—CROSS-COMPLAINT.
 L—DEFAULT.
 M—DEMURRER.
 N—ERROR AND REVIEW.
 O—EVIDENCE—WITNESS.
 P—FINDINGS.
 Q—FORM OF ACTION.
 R—FORMER SUIT OR RECOVERY.
 S—INSTRUCTIONS.
 T—ISSUE.
 U—JUDGMENT AND DECREE.
 V—JURISDICTION.
 W—MOTIONS—NOTICE—ORDERS—RULES.
 X—NEW TRIAL.
 Y—NON-SUIT.
 Z.—PARTIES—JOINDER AND MISJOINDER.
 AA—PLEADINGS IN GENERAL.
 BB—PRAYER.
 CC—PROCESS.
 DD—REMITTITUR.
 EE—REPLICATION.
 FF—TRIAL—REFERENCE—JURY.
 GG—VARIANCE—WAIVER.
 HH—VERDICT.

A. Admissions by Pleading.

1. *No admission by failure to reply—Error without prejudice.*
Caruthers v. Pemberton, 4, 622
2. *Denial of unlawful breaking of ditch.*—Where the fact that the

PLEADING AND PRACTICE—Admissions by Pleading. *Conf'd.*

defendant "wrongfully" broke a flume is denied, the fact that he broke it is admitted and no proof of breaking is required; and conceding plaintiff's right of property in the flume would entitle him at least to nominal damages upon the pleadings. *Feeley v. Shirley*, 12, 133

8. *To general denial construed as specific admission.* *Verzan v. McGregor*, 2, 566

4. *Admissions in answer which negative denials.*—*The latter may be disregarded.* *Fremont v. Seals*, 11, 633

5. *Insufficient denial of averment of labor.*—The complaint charged that labor was performed on a certain mining claim and the denial was a denial that he worked for the defendant. *Held*, an admission that the work performed and sued for was done upon the claim specified. *Bradbury v. Cronise*, 9, 366

6. *Implied denial of title with implied concession of the trespass.* *Wood v. Richardson*, 12, 121

7. *The material allegations in a complaint for partition of real property which are not denied by the answer, are deemed admitted for the purposes of the trial.* *Hughes v. Devlin*, 12, 242

8. *Title admitted by demurrer—Injunction.*—When the defendants by demurring to the complaint have admitted the right of the plaintiff to the use of the water in controversy, the plaintiff may have an injunction against its diversion without first establishing his title by an action at law. *Tuolumne Co. v. Chapman*, 11, 85

9. *Admissions by failure to plead over.*—In an action of trespass the declaration alleged ownership of the close; a demurrer to the defendant's plea in abatement was sustained and the defendant failed to plead further; *held*, that by this course the defendant admitted all the facts alleged in the declaration, and would not be permitted to prove in mitigation of damages an entry under color of title, or to interpose any substantive defense. *Utley v. Clark-Gardner Co.*, 4, 39

B. Amendment.

10. *Amendment at the hearing.*—Plaintiff having declared for the entire property, it was developed on the trial that in consequence of a defective deed he had title to only two-thirds of the claim. *Held*, that plaintiff could not, on this declaration, recover for two-thirds, and that the person holding title to the other third of the claim might not, without his consent, be joined as party plaintiff, yet plaintiff might amend his complaint so as to demand but two-thirds. *Van Zandt v. Argentine Co.*, 4, 441

11. *Of defective complaint.*—Upon complaint seeking an accounting between ditch owners, proceeding partly upon the theory of a partnership between the parties, and partly upon the theory of a cotenancy, but failing to state facts sufficient to constitute either a partnership, or sufficient to make a case for partition: *Held*, that the plaintiffs were not entitled to any of the relief demanded in the prayer, but would be allowed to amend on payment of costs. *Bradley v. Harkness*, 11, 389

PLEADING AND PRACTICE—Amendment. *Continued.*

12. *The Appellate Court may amend decree of the court below.*
Union Co. v. Murphy's Flat Co., 3, 488

13. *Misjoinder may be cured by amendment.* *Huff v. McDonald,*
 14, 262

C. Answer.

14. *Contract to pay royalty—Affidavit of defense.* *Eshelman v. Thompson,* 4, 146

15. *Plea in equity defined.*—A plea in equity is a special answer, only allowed when it puts the matter upon some *one point* which is decisive of the controversy. *Carter v. Hoke,* 12, 579

16. *Striking out part of answer.*—Upon suit for services under a contract defendant answered that plaintiff had violated his contract, and also alleged certain torts by him committed in slandering the credit of the company. *Held,* that the allegations of tort were properly stricken from the answer. *Bates v. Sierra Nevada Co.,* 1, 345

17. *Shifting burden of proof.*—An answer which is not responsive to the complaint makes no issue. When the complaint which is not denied makes out a *prima facie* case, the burden is upon the defense to sustain their affirmative allegations. *Thompson v. Lee,* 1, 610

18. *Objection to sufficiency of answer after verdict.*—An objection that the answer is insufficient to form an issue, comes too late when made for the first time after verdict. *Orr v. Haskell,* 4, 493

19. *Form of denial.*—Any form of denial which meets and traverses the allegation is admissible. If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. *Hill v. Smith,* 4, 597

20. *To a count of a declaration upon a bond, non est factum* is the appropriate plea, but *nul debet* is proper where the bond is set forth merely as inducement. *Gear v. Shaw,* 7, 643

21. *Statutory denials of answer.*—Where the statute provides that the allegations of the answer shall be deemed to be denied, this does not take the place of a bill in equity on which to grant affirmative relief. *Kahn v. Old Telegraph Co.,* 11, 647

22. *Answer can not vary legal effect of contract.* *Fort Scott Co. v. Sweeney,* 12, 166

23. *Failure to deny damages.*—In trespass, where defendant fails to deny the amount of damages alleged in the complaint, although the alleged cause of the damage be denied: *Doubted* whether the amount of damages was put in issue. *Rowe v. Bradley,* 14, 431

24. *Rule where the answer denies all equities.* *Development Co. v. Silva,* 15, 435

D. Appeal.

25. *Final judgment.*—A judgment providing, in addition to its other terms, that an account be taken, is nevertheless a final judgment, from which an appeal may be taken. *Neall v. Hill,* 1, 80

26. *From judgment on demurrer.*—Where a demurrer to a petition in a suit in equity is sustained in the District Court, the cause may be taken by appeal to the Supreme Court. *Arnold v. Baker,* 7, 117

PLEADING AND PRACTICE—Appeal. *Continued.*

27. *Consolidation of causes in Supreme Court* can not be made if the plaintiff and defendant each appeal from different portions of the same judgment, and the parties do not stipulate that either transcript may be added to the other. *Fair v. Stevenot*, 11, 11
28. *Notice of appeal, when sufficient.* *Coates v. Cheever*, 5, 55
29. *Withdrawal of appeal.* *Brown v. Corey*, 5, 338
30. *Practice on appeal as to counter exception.*—It is the practice of the Supreme Court of California to look only to the errors assigned by appellant, and not to consider exceptions taken by respondent. *Jackson v. Feather River Co.*, 5, 594
31. *An appeal which rests upon the Statute of Limitations*, will not be considered if the transcript fails to show when the action was commenced. *Reamer v. Nesmith*, 5, 610

E. Assignments of Error.

32. *Grounds of appeal not set forth in the statement* will not be considered on appeal. *Wixon v. Bear River Co.*, 1, 656
33. *Assignment of errors not to be received as a statement of facts.* *Fleeson v. Savage M. Co.*, 8, 153

F. Bill of Exceptions.

34. *Presumption as to evidence in bill of exceptions.*—Where a particular point is raised by a bill of exceptions, and evidence is set out in the bill as bearing, or evidently tending to bear upon that point, it is proper to infer that no evidence was given which would alter the effect of that which is stated. *Atlas Co. v. Johnston*, 1, 389
35. *Waiver of technical exceptions.*—If technical exceptions be not brought to the notice of the court in a formal manner and at a proper time, it will be presumed that the party elects to proceed on the merits. *Watts' Appeal*, 8, 222
36. *If the bill of exceptions does not purport to contain all the evidence* the Supreme Court can not inquire whether the verdict of the jury is supported by the evidence or not. *Gordon v. Darnell*, 2, 220
37. *A bill of exceptions should state the ground of objection to evidence*, and if the record go up on a general objection only, the ruling of the court will be sustained if the evidence be proper for any purpose. *Cullum v. Wagstaff*, 2, 573; *Winans v. Hassey*, 2, 285
38. *An objection to evidence not followed by an exception* amounts to acquiescence in the ruling. *Turner v. Tuolumne Co.*, 1, 107
39. *Necessity of exception to report of master.*—As a general rule the report of a master, or a commissioner acting as master, is received as true when no exception is taken, and parties who are dissatisfied with such a report should except to it, or take some other action appropriate to the objection. *Butterfield v. Beardsley*, 11, 495
40. *Transcripts and papers not incorporated into bill of exceptions* will not be considered. *Van Valkenburg v. Huff*, 9, 467; *Noteware v. Sterns*, 4, 650
41. *No record, no review.*—The Supreme Court will not consider questions argued before it, when the facts and proceedings upon which

PLEADING AND PRACTICE—Bill of Exceptions. *Continued.*

such arguments are based are not brought up in the record. *Rogers v. Cooney*, 14, 85; *State v. Manhattan Co.*, 14, 149

42. *Presumptions in favor of certified statement* are that a statement was presented, the objections thereto considered, and that it conformed or was made to conform to the truth. *Overman Co. v. American Co.*, 2, 251

43. *Bill of exceptions when there is controversy* as to weight, effect, or admissibility of evidence should set forth the evidence given or offered at length, and contain an averment that such evidence was all that was given or offered. *Knowlton v. Culver*, 12, 682

44. *Exception taken after jury has retired.*—Exceptions to instructions taken after the jury has withdrawn to consider the verdict, but before the verdict is rendered, may be either allowed or refused, in the discretion of the court, and no error committed. *St. John v. Kidd*, 4, 454

45. *Pleas tendered but rejected by the court* are never a part of the record, unless made so by bill of exceptions; a memorandum that the matter thereof might be allowed in evidence. *White v. Toncray*, 2, 463

46. *Idem.*—If pleas be rejected and no exception saved, the defendant shall be presumed to have acquiesced. *Id.*

G. Change of Venue.

47. *When a cause has been removed from one justice to another*, parties, after proceeding to trial without objection, can not, after trial, assert that it was not sent to the proper justice. *Cox v. Groshong*, 6, 210

H. Common Counts.

48. *Stock sale—Efficiency of the common counts where a recovery is allowable upon either view of contested facts.* *Cutter v. Demmon*, 3, 119

49. *Defective common counts.*—The words "money payable," are material in the count for money received. A count for "amounts stated," will not be treated over objection as for "accounts stated." *Penniman v. Winner*, 2, 449

I. Complaint.

50. *The non-averment of an essential fact* will prevent recovery, although no demurrer be interposed on this account. *Cook v. Andrews*, 3, 171

51. *Surplusage.*—In an action by B. against P., to recover money paid under the foregoing contract, the declaration contained two counts in tort and one in contract, all for the same cause of action. *Held*, that after striking out certain portions of the declaration, it still set forth a good cause of action. *Pease v. Brown*, 3, 46

52. *Allegations on information and belief.*—Under section 118 of the Practice Act, the allegations of a complaint can be made on information and belief. *Flagstaff M. Co. v. Patrick*, 4, 20

PLEADING AND PRACTICE.—*Complaint. Continued.*

53. *Defective complaint.*—A complaint in which damages are claimed for the obstruction of the flow of water and tailings in a canon is radically defective if it fails to allege that plaintiffs are entitled to the use of the canon to convey away such water and tailings. *Stone v. Bumpus*, 4, 272

54. *Averments in complaint in suit for damages for sale of canal.* *Reynolds v. Hosmer*, 4, 657. *The same, in complaint for diversion of water.* *McDonald v. Bear River Co.*, 1, 628

55. *A declaration is good after verdict which shows a good cause of action*, though defectively stated; otherwise, if it show no cause of action though correct in form. *Cornelius v. Molloy*, 6, 458

56. *Defect in complaint ignored after verdict.* *Coryell v. Cain*, 5, 227

57. *Mingled averments of tort and contract.*—Where sufficient facts are stated to justify recovery, the confusion of matters of tort and contract in the statements of the complaint, will not prevent the pleading being sustained. *Prescott v. Wells*, 6, 89

58. *The allegation of the value of fixtures*, in suit for their conversion, is not essential. It is sufficient to allege the amount in which plaintiffs were damaged. *Id.*

59. *Certainty, in action of debt.*—Debt lies on any contract in which the certainty of the sum or duty appears. *Kirk v. Hartman*, 11, 451

60. *Pleading a conclusion of law.*—An averment that certain persons became subscribers to the capital stock of a corporation by signing and delivering an agreement is not a statement of fact, but a mere conclusion of law. *Wheeler v. Floral Co.*, 2, 623

61. *Verbiage and loose allegations* do not vitiate a complaint where the facts stated are sufficient to sustain an action. *Weaver v. Conger*, 6, 203

62. *Form of pleading false pretenses* must be that of a distinct and specific averment of the falsehood of each separate matter of fact stated by the defendant, and intended to be denied by the plaintiff. *Byard v. Holmes*, 6, 657

63. *Multifariousness.*—Where complainants claim by the same right, charge a common wrong, and pray a common redress, the bill is not multifarious. *Hand v. Dexter*, 3, 608

64. *Multifariousness.*—A bill which joins defendants, some of whom are liable to one plaintiff only, some of whom are liable to another, and some of whom are responsible, if at all, for independent violations of the statute, falls within the definition of multifariousness. *Sheriff v. Globe Oil Co.*, 13, 475

65. *Averment that defendants are "the duly elected trustees of said company,"* implies them sole trustees. *Parrott v. Byers*, 13, 505

66. *Pleading facts under different statutes.*—Where a complainant states facts sufficient, under the terms of a State law or of an act of Congress on the same subject, he is entitled to the rights given by either. *Hobart v. Ford*, 15, 286

PLEADING AND PRACTICE. *Continued.*

J. Continuance.

67. *Discretion of court.*—An affidavit for a continuance on the ground of the absence of material witnesses failed to give their names, or to state what was expected to be proved by them. *Held*, that a motion for a continuance based on this affidavit was addressed to the discretion of the court, and that the discretion was not improperly exercised in denying the motion. *Carey v. Philadelphia Co.*, 1, 849

K. Cross-Complaint.

68. *Defenses should be separately stated.*—Each defense should be complete in itself, and a cross-complaint should be separate from the other defenses. *Meyendorf v. Frohner*, 5, 560

69. *Where the defendant has a distinct equity*, he must set it up by a cross-bill or by an original bill; he can not have the benefit of it by an answer. *Weisman v. Smith*, 11, 152

L. Default.

70. *Defendants for whom no appearance is entered.*—Where counsel, in the first of a series of pleas filed, expressly designate the defendant for whom they appear, the words, "the defendants" in the subsequent pleas must be referred to the defendants named in the first plea, and can not fairly be held to be an appearance for a defendant served, but not named in the first plea. There being no appearance for such defendant it is error to enter final judgment against all the defendants, without first entering judgment by default against the one for whom there is no appearance. *Streeter v. Marshall M. Co.*, 7, 660

71. *Affidavit to set aside.*—A defendant who has been properly served with summons, and has suffered a default, should not be allowed to come in and answer without an affidavit of excusable neglect, and of merits. *Lamb v. Gaston Co.*, 1, 331

72. *Vacating judgment—Default set aside.*—It is not error for the court to sustain a motion to vacate a judgment and set aside a default, and allow the defendant to make answer to the merits of the complaint, when the service of summons is defective. *Brown v. Gaston Co.*, 1, 376

M. Demurrer.

73. *By pleading over, after demurrer overruled*, plaintiff waives all right to arrest of judgment for insufficient declaration. *Quincy Co. v. Hood*, 12, 148

74. *Demurrer to evidence—Judgment.*—Defendants demurred to the evidence, and the commonwealth having joined therein, the court discharged the jury and gave judgment for the commonwealth on the demurrer. *Held*, that this was not erroneous. *Hutchison v. Commonwealth*, 4, 209

75. *Order on demurrer construed—Effect of sustaining demurrer.* *Barber v. Cazalis*, 2, 684

PLEADING AND PRACTICE—Demurrer. *Continued.*

76. *Alteration of contract—Demurrer to bill.* *Rose Clare Co. v. Madden,* 3, 42

77. *Demurrer ore tenus* allowed—and defined in nota. *Robinson v. Smith,* 3, 443

78. *Demurrer—Complaint qualified by exhibit.*—H., one of the defendants, demurred to a complaint which alleged that the defendants made and filed a report, "a copy whereof is hereto annexed," and that defendants signed the report knowing it to be false. The annexed copy did not purport to be signed by H. *Held,* that by demurring, H. did not admit that he signed the report, but that the general averment in the complaint that defendants signed, was limited by the copy annexed to those who appeared by it to have signed. *Bunnell v. Griswold,* 4, 16

79. *Demurrer admits facts but not conclusions of law.* *Id.*

80. *General demurrer where one good count exists* will not be sustained. *Weaver v. Conger,* 6, 203

81. *Demurrer overruled—Error without prejudice.*—Although the court below erroneously overruled the plaintiff's demurrer to the affirmative matter set up in the defendant's answer, yet, because the defendant offered no proof in support of such affirmative matter, the plaintiff was not prejudiced thereby and the judgment will not be reversed. *Campbell v. Bear River Co.,* 10, 656

82. *Duplicity in pleading* is bad upon special demurrer. *Munro v. King,* 12, 160

83. *Defects in form in a bill in equity can not be reached by a general demurrer.*—The bill, though objectionable in form, must be sustained, if it show a case for equitable relief. *Glidden v. Norvell,* 12, 170

84. *Demurrer to complaint for uncertainty.*—A complaint, defective because it fails to show in whom is the title to the subject-matter in controversy, can not be reached by general demurrer; it should be attacked by special demurrer. *Reynolds v. Hosmer,* 4, 657

N. Error and Review.

85. *A ruling made by consent of parties* can not be subject of consideration in the Supreme Court. *Coryell v. Cain,* 5, 227

86. *Conflict in testimony—Finding.*—When there is a substantial conflict in the testimony, the findings of the lower court will be held to be sustained by the evidence. *Overman Co. v. Corcoran,* 1, 691

87. *A judgment will not be reversed for a mere formal error* in the proceedings of the court below, which does not affect the merits of the case. *Lyell v. Sanborn,* 1, 313; *Wynkoop v. Seal,* 13, 493; *Murray v. Haverty,* 14, 325

88. *Grounds of decision not material* in a case tried by the court, in lieu of a jury. No requests for rulings or findings were made; the general rule adopted by the trial court not being questioned, the judgment will not be disturbed. *Chatham Co. v. Moffat,* 16, 103

89. *Judgment, when not reversible.*—A party can not reverse a judgment on an answer of the court below, favorable to him, or on an answer to an abstract question. *Brown v. Caldwell,* 12, 674

PLEADING AND PRACTICE—Error and Review. *Continued.*

90. *Error without injury.*—Erroneous instructions are no ground of reversal when it is apparent that the verdict would have been the same with correct instructions. *Green v. Ophir Co.*, 12, 140

91. *If a plaintiff is entitled to a verdict*, on the evidence, erroneous instructions on the law can not prejudice the defendant. *Id.*

92. *Error, not followed up.*—Where the record shows an improper question asked, objected to, and the objection overruled, the record must further show, to be error, that the improper question was answered by the witness. *Myers v. Spooner*, 9, 519

93. *Point not argued below.*—When the question of “way leave” was not argued before the first division of the Court of Session, it will not be entertained in the House. *Livingstone v. Rawyards Co.*, 10, 291

94. *Presumption of injury from erroneous charge* attends the charge. *Attwood v. Fricot*, 2, 805. The same on refusal to charge. *Busenius v. Coffee*, 5, 215

95. *Consideration of the opinion of the judge below.*—If the opinion of the president of the court below is filed of record, with the reasons, the court above in error are bound to notice it, though it do not appear to have been filed at the request of either party. *Brown v. Caldwell*, 12, 674

96. *Reversal for error on points of evidence.* *Bowyer v. Seymour*, 9, 67

97. *Error not in record.*—The court can not notice matter alleged for error, unless it appears on the record. *Boswell v. Green*, 2, 863

98. *Error without prejudice.*—A cause will not be reversed for the admission of irrelevant testimony, if it appears that the appellant was not prejudiced thereby. *State v. Berryman*, 4, 199; *Priest v. Union Co.*, 4, 515

99. *An entire judgment, if reversed as to one defendant*, must be reversed as to all. *Streeter v. Marshall Co.*, 7, 660

100. *Third parties.*—Irregularities and defects of form in judicial proceedings can be taken advantage of by parties or privies only; third persons have no right to interfere. *Breading v. Boggs*, 11, 296

101. *Irregular proceedings in equity, when disregarded.*—In proceedings in equity, for account, etc., there was an answer denying the allegations of the bill, but no replication; the court, without finding a partnership or decreeing an account, referred the case to a master, who heard testimony, found facts and reported an account. *Held*, to be irregular, but no exception being taken in the court below, the Supreme Court would disregard the irregularity. *Hedge's App.*, 11, 463

102. *The Supreme Court can not re-inquire* into questions of fact and of credibility already passed upon by a jury. *Curtin v. Munford*, 12, 585

103. *No procedendo when recovery impossible.* *Emery v. Owings*, 8, 379

104. *No reversal for error without prejudice.* *Union Co. v. Taylor*, 5, 324

PLEADING AND PRACTICE—Error and Review. *Continued.*

105. *Writs of error and certiorari are of right.* *Hutchison v. Commonwealth*, 4, 209
106. *Review of evidence in chancery case.*—In a suit in chancery where the evidence has been taken before a master, the Appellate Court will examine into the entire record, and affirm or reverse the decree of the court below upon principles of equity, as the facts will justify. *Jackson v. Allen*, 7, 137
107. *An appeal on the ground that the evidence fails to sustain the verdict*, will be disregarded if the statement fails to specify the particulars in which the evidence is claimed to be insufficient. *Reamer v. Nesmith*, 5, 610
108. *Points not made below* will not be considered above. *Rowe v. Bradley*, 14, 481; *Belk v. Meagher*, 1, 510; *Bassett v. Monte Christo Co.*, 4, 108
109. *Weight of evidence.*—The Appellate Court will not interfere with the verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases. *Kimball v. Gearhart*, 1, 615; *White v. Todd's Valley Co.*, 4, 557
110. *Objections to transcript made too late.*—It is too late make technical objections to a transcript after the case is submitted upon its merits. *St. John v. Kidd*, 4, 454
111. *Affidavits required upon extraneous errors.*—The Supreme Court of Montana will not consider errors assigned for irregularity in the proceedings of the court, and accident and surprise, unless supported by affidavits, as required by section 284 of the Practice Act. *Orr v. Haskell*, 4, 492

O. Evidence—Witness.

112. *Interested witnesses.*—The exception to the general rule which forbids interested members of a corporation from testifying on its behalf, is confined to keepers and depositaries of corporate documents. Members, acting for the corporation in ordinary matters of business, when interested, are incompetent to testify. *Blen v. Bear River Co.*, 3, 485
113. *Practice in Supreme Court—Objections to evidence.*—The Supreme Court will only consider objections to evidence upon grounds specified in the court below, and will not reverse a ruling admitting or rejecting evidence upon a ground in no way suggested at the time of objection, and which the court was not called upon to decide. *Gooch v. Sullivan*, 5, 14
114. *The proof of the value of the fixtures*, is material in showing the amount of damages. *Prescott v. Wells Fargo Co.*, 6, 89
115. *Where a material allegation of the bill is positively denied by answer under oath*, it must be established by proof sufficient to overcome the answer and opposing evidence. *Bragg v. Geddes*, 5, 624
116. *Cross-examination is limited closely to the subjects of the direct examination.* *Chicago Co. v. Northern Ill. Co.*, 15, 198; *Tiley v. Moyers*, 4, 321
117. *Pleadings and evidence in justice's court* are not required to

PLEADING AND PRACTICE—Evidence—Witness. *Continued.*

be of the same nicety as in courts of record; and evidence will be received under pleadings joined in the former which could not be received under pleadings joined in the latter. *Musier v. Trumpbour*, 11, 260

118. *Proof of title.*—A defendant who denies that the plaintiff is the owner of a mining claim may overcome the plaintiff's evidence of title by proving title in himself. *Stone v. Bumpus*, 4, 273

119. *Videlicet.*—The amount agreed to be paid being laid under a videlicet, it is not necessary to prove the exact sum stated. *Beard v. Converse*, 2, 670

120. *General objection.*—An objection to testimony as to the extent of a location as given by a witness, held, too general to be considered. *Dunning v. Rankin*, 9, 455

121. *Excluded offer.*—When the object of an offer of testimony is not disclosed by the record the court will presume in favor of the ruling below. *Watson Co. v. Casteel*, 9, 180

P. Findings.

122. *Where a finding contains three specific statements of fact, a specification of error, designating it by number simply, as not sustained by the evidence, is insufficient.* *Anthony v. Jillson*, 16, 26

123. *If the findings of the court are defective in omitting to find a material fact, the party aggrieved should move to correct them; and if any fact is found contrary to the evidence, it should be specified in a motion for a new trial.* *Pralus v. Jefferson Co.*, 12, 478

124. *Findings not disturbed.*—Findings will not be disturbed if the statement on motion for a new trial entirely fails to specify the particulars wherein the evidence is insufficient to justify, or contrary to, the findings. *Pralus v. Pacific G. & S. M. Co.*, 12, 478

125. *One of several findings may be set aside without reversing the judgment, if the remaining findings are sufficient to support the judgment; and the finding so vacated would be thus taken out of the operation of the rule relating to the res adjudicata.* *420 M. Co. v. Bullion M. Co.*, 11, 608

126. *Insufficient findings.* *Morenhaut v. Wilson*, 1, 53

127. *Findings of court on legal issue.*—When there is no issue properly cognizable in equity, findings on the facts by the court below must be treated the same as if the same facts had been found by a jury. *Judge v. Braswell*, 11, 508

128. *Findings before judgment.*—Where, under the practice established in Utah, issues are tried by the court, its findings of fact should be announced and filed before the entry of the judgment. *Kahn v. Central Smelting Co.*, 11, 540

129. *Unauthorized entry of new finding.*—After such entry an additional finding, made at the request of either party, without notice to the other, forms no part of the record. *Id.*

130. *Findings inconsistent with pleadings.*—A finding contrary to the admissions of the pleadings, must be disregarded. *Bradbury v. Croniss*, 9, 866

PLEADING AND PRACTICE—Findings. *Continued.*

131. *Form of finding* and decree upon the issue of citizenship submitted to a jury. *Fremont v. Merced M. Co.*, 7, 333

132. *Reasons for finding are no part of judgment.*—The point decided is the thing fixed by the judgment. *Burke v. Table Mountain Co.*, 5, 210

133. *Finding of fact not conclusive as to right.* *Id.*

134. *Rules for construing findings.*—The findings of fact by the court are like a special verdict of a jury, and must be taken in connection with the pleading, to support the judgment; they can not be detached from each other, but must be read together, and if there is any conflict or discrepancy between general and special findings, the specific findings must control. *Barnes v. Sabron*, 4, 675

135. *Finding in disregard of referee's conclusions.*—A court of general jurisdiction, in passing upon the findings of law and fact contained in a referee's report in a case of trespass, sustained exceptions to several conclusions of law therein contained, and also sustained a motion to enter such a judgment as the facts proven and the law warrant: *Held*, that there was nothing in these facts, or the language used, to show that the court disregarded the findings of fact by the referee, and proceeded on its own finding, thereby exceeding its jurisdiction. *Little Pittsburg Co. v. Little Chief Co.*, 15, 655

136. *Sufficient findings of fact.*—A general finding by the court that "all the allegations and averments in plaintiff's complaint are true and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by the pleadings. *Prabus v. Pacific Co.*, 12, 473

137. *Practice in Montana—Special findings.*—Under the Practice Act of Montana, when there is no special finding upon an issue presented by the pleadings, but the decree recites that the equities are with plaintiffs, it will be presumed that the court found the issue for the party for whom judgment is rendered. *Fabian v. Collins*, 5, 20

138. *Special findings not to include evidence.* *Union Co. v. Taylor*, 5, 324

Q. Form of Action.

139. *The Practice Act of California abolishes all forms of action.* *McLaughlin v. Kelly*, 7, 446

140. *Separate actions.*—A perfected claim for labor will not support separate actions for the different amounts into which it may be divided, even though portions of it have been assigned and the division of the claim corresponds to the periods for which the labor was hired. *Milroy v. Spurr Mtn. Co.*, 12, 53

141. *Forms of action under the code.*—Under our Practice Act it is immaterial whether the language used in the complaint be that belonging to one form of action or another, or to no form of action: the material question is, do the facts stated show that the plaintiff is entitled to any remedy, legal or equitable. *Kuhn v. McAllister*, 14, 513

142. *Choice of action by defrauded party.*—He may (1) maintain an action for deceit against the person guilty of fraud; (2) he may waive

PLEADING AND PRACTICE—Form of Action. *Continued.*

the fraud and proceed for breach of the original contract; or (3) having legally rescinded the contract, he may recover in assumpsit whatever he has paid upon it. *Byard v. Holmes*, 6, 598

143. *Practice Act governs all actions, both in law and equity.*
Houtz v. Gisborn, 2, 840

R. Former Suit or Recovery.

144. *Lit pendens*.—A plea of former suit pending between the same parties is not sustained by showing the existence of a suit where no summons had followed the complaint, and no appearance by the defendants. *Weaver v. Conger*, 6, 203

145. *Proviso deferring right to suit after breach*.—Where there is a covenant to pay money by a certain day, with a *proviso* that no action shall be brought till after the expiration of a month, the action is premature if brought within the month. *Foley v. Fletcher*, 4, 180

146. *Where another action is pending between the same parties*, a plea to that effect will cause its dismissal. *Davis v. Flagstaff Co.*, 2, 661

147. *Conciliation*.—The Mexican requirement of conciliation by common consent, has been discarded as a useless formality. *Von Schmidt v. Huntington*, 6, 284

S. Instruction.

148. *Instruction upon points not involved are properly refused.*
Schissler v. Cheshire, 5, 309; The same as to instruction concerning matters not in record. *Hinkle v. S. F. & N. P. R. R. Co.*, 5, 645

149. *There is no error in refusing instructions not based upon the evidence in the case.* *Alderson v. Ennor*, 8, 526

150. *General charge*.—In the statement of a general principle of law, it is not improper for the court to allude to exceptions to the rule, or to notice such circumstances as would prevent its operation. *Van Valkenburg v. Huff*, 9, 467

151. *Facts assumed in instructions, when no error*.—It is no ground for error that an instruction assumed that the defendant was the agent of the E. M. Co., even though the evidence did not fully warrant such assumption, provided it was not productive of any injury to plaintiffs; (Per SPRAGUE, J., dissenting.) *Bradley v. Lee*, 4, 470

152. *Erroneous assumption in instructions*.—An instruction which assumes, as a fact established, one of the issues tendered by the pleading, or which assumes that an outstanding title in a stranger will defeat plaintiff's right to recover possession of a mining claim, is erroneous. *Id.*

153. *Contradictory instructions*.—An instruction which seems to submit to the jury the construction of a custom which, in a previous instruction, had been construed by the court, tends to nullify the construction of the court and to confuse the jury. *Id.*

154. *Instructions to the jury are to be read together.* *Id.*

155. *Instructions correct in principle but not pertinent*, should not be negatived without qualification; but if deemed inapplicable to the

PLEADING AND PRACTICE—Instruction. *Continued.*

circumstances of the case, the court should refuse on that ground to charge as requested. *McKnight v. Ratcliff*, 11, 364

156. *Instruction assuming disputed facts.*—Where title in plaintiff is denied, an instruction speaking of the "land of plaintiff" or "plaintiff's land," recites as admitted the contested fact, and is erroneous. *Wood v. Richardson*, 12, 121

157. *Where a case is tried under a misapprehension of the law*, the judgment below must be reversed. *Furnum v. U. S.*, 4, 193

158. *A single erroneous instruction may reverse*, unless upon the whole case the judgment ought to stand. *Richardson v. McNulty*, 1, 11

159. *Improper testimony cured by instructions.*—Where testimony is improperly admitted, but afterward excluded by instructions, it may not, under all circumstances, amount to error sufficient to entitle to a new trial. *Yankee Jim Co. v. Crary*, 1, 198

160. *Instructions at variance with evidence* are ground for reversal. *Sargent v. Linden Co.*, 3, 207

161. *Misleading instruction.*—It is error to give an instruction which is sound as a proposition of law, if there is no legal evidence on which to base it. Such an instruction is misleading. *Mining Co. v. Bruce*, 3, 146

162. *Charge overlooking the merits—Recoupment of loss to furnace.*—A charge missing the points of the case, fails to enlighten the jury, and can not be sustained. *Burton v. Wilkes*, 3, 88

T. Issue.

163. *Matters of inducement distinguished from matters which make the issue.* *Boswell v. Green*, 2, 363

164. *Special issues should be framed* to include all questions of fact raised by the pleadings and necessary to determine the case, and should be separately and distinctly stated, so that each question should relate to only one fact. *Phoenix Water Co. v. Fletcher*, 15, 186

U. Judgment and Decree.

165. *Judgment in coin.*—Upon a coin contract, the judgment should be for the amount stated in coin, payable in coin, with costs payable in currency. *Wild v. New York Co.*, 1, 418; *Winans v. Hassey*, 2, 285

166. *Judgment on referee's report.*—The rule that a judgment will not be disturbed unless manifestly against the weight of evidence, does not obtain where the testimony has been taken before a master or referee. *Miller v. Taylor*, 9, 547

167. *Judgment for official delinquency.*—A judgment for damages against an officer for official delinquency, which remains unsatisfied, will not prevent a subsequent action on the official bond. *State v. Krutchnitt*, 14, 130

168. *A court cannot, without their consent, decree the rights incidentally involved between co-defendants.* *Pratt v. Taunton Co.*, 13, 590

169. *Perpetual decree, on prayer for temporary relief.*—Under a

PLEADING AND PRACTICE—Judgment and Decree. *Continued.*

prayer to enjoin the removal of mining machinery, etc., until the further order of the court, pending proceedings to determine the forfeiture of the lease, the court may, on the hearing, make the order *perpetual* if satisfied there never should be any further order to the contrary. *Wilmington M. Co. v. Allen*, 9, 107

170. *Decree on the entire pleadings.*—Where a bill, cross-bill, petition and answer thereto, relating to the same subject-matter, are consolidated and heard together and a decree rendered, it will be considered as made in view of all the allegations contained in all the pleadings, although the petition and cross-bill may have been dismissed on the hearing. *Id.*

171. *Material variance* and other incidents recited as rendering a decree void. *Kinney v. Con. Va. Co.* 10, 457

V. Jurisdiction.

172. *Plea to jurisdiction.*—When the want of jurisdiction is not patent on the record the proper mode to take advantage of it is by plea. *Fremont v. Merced M. Co.*, 7, 332

173. *Multiplicity of suits.* *Dannmeyer v. Coleman*, 5, 474

W. Motions—Notice—Orders—Rules.

174. *Notice of motion.* *Sowden v. Idaho Co.*, 2, 199

175. *Motion to withdraw counter-claim.*—When the record shows that after the testimony had closed, and before the court had finished charging the jury, the defendants moved for leave to withdraw their counter-claim, which motion was overruled, such ruling will not be disturbed unless manifest injustice is done thereby. *Isaacs v. McAndrew*, 9, 691

176. *Notice of motion for new trial waived.*—A failure to give notice of intention to move for a new trial, although the motion has been duly filed, will not warrant the denial of the motion if the successful party failed to reserve his right to make this objection at the time he proposed amendments to the statement. *Brundage v. Adams*, 11, 470

177. *Special proceedings.*—Under Sec. 76, Code of Civil Procedure, courts are always open to hear special proceedings of a civil nature. *Stewart v. Mahoney Co.*, 4, 106

178. *If a rule to plead expires in term time*, a pleading may be interposed at any time before application for default. *Walker v. Tiffin Co.*, 10, 572

179. *It is otherwise when the rule expires in vacation.*—In that case the defendant must plead within the time specified, and a demurrer filed after the rule day may be stricken from the files, and the bill taken as confessed. *Id.*

X. New Trial.

180. *Attorney's affidavit.*—The court properly refused to grant a new trial upon the affidavit of the attorney of record that he and defendants were absent from the trial because of an oral agreement by

PLEADING AND PRACTICE—New Trial. *Continued.*

opposing counsel to give notice of the day of trial, when met with counter-affidavits denying such agreement, and when other counsel did appear for defendants and contested the case. *McDonald v. Bear River Co.*, 1, 626

181. *To reform findings.*—A new trial will not be granted for the purpose of having the language of a finding made more exact, when it is sufficiently distinct as to the subject-matter of the action. *McKinney v. Smith*, 1, 650

182. *The rejection of material testimony* in rebuttal, is a proper ground for new trial. *Smith v. Richardson*, 1, 139

183. *Review on appeal.*—When a motion for a new trial is founded entirely upon alleged errors of law in proceedings of the court below, the Supreme Court will review an order granting or refusing the motion. *Cochran v. O'Keefe*, 3, 288; *Barnes v. Sabron*, 4, 675

184. *New trial on weight of testimony.*—When the judge presiding has refused a new trial on the allegation that the verdict is contrary to the testimony, it must be a strong case where this court would overthrow such verdict. *Wood Hydraulic Co. v. King*, 3, 618; *Orr v. Haskell*, 4, 493

185. *Order granting new trial, when reversed.*—It is not enough to authorize the Appellate Court to reverse an order granting a new trial, that the evidence appears fully to support the verdict. It will only be reversed for the most cogent reasons. *Phillpotts v. Blasdel*, 4, 342

186. *Mistake of counsel as to competency of witnesses no ground for new trial.* *Packer v. Heaton*, 4, 447

187. *Error without injury.*—Even where error may have intervened, a new trial should not be granted when it is clear that no injury has been done, and that the verdict ought, upon the whole record, to stand as it is. *North Noonday Co. v. Orient Co.*, 9, 525

188. *Service of statement to support new trial, unnecessary.* *Brundage v. Adams*, 11, 470

189. *Scope of assignment of error for refusal to grant new trial.* *Chicago R. R. v. N. Ill. Co.*, 15, 198

Y. Nonsuit.

190. *Nonsuit because of misjoinder.*—A motion for nonsuit on the ground of misjoinder should not be granted if it appear that some of the plaintiffs are entitled to recover. *Rowe v. Bacigalluppi*, 5, 237

191. *Shifting position in Appellate Court.*—The ruling that a compulsory nonsuit may be allowed, affirmed; but a defendant asking nonsuit on specific grounds below, can not shift his position on appeal. If the evidence does not justify a verdict, or if a verdict found would be set aside by the court, a nonsuit ought to be granted. *Mateer v. Brown*, 7, 156

Z. Parties—Joinder and Misjoinder.

192. *Conveyance pending trial.*—Where plaintiffs have parted with their interest in the subject-matter, the suit can not proceed until the proper parties are substituted, if the objection be insisted on. *Boyle v. Laird*, 7, 301

PLEADING AND PRACTICE—Parties, etc. *Continued.*

193. *Objections to misjoinder, how taken.*—By the Practice Act in California, objections to the misjoinder or nonjoinder of parties must be taken by demurrer or answer, and if not so taken are to be deemed waived. *Rowe v. Bacigalluppi*, 5, 237

194. *Joinder of counts in trover and assumpsit*, is no ground for a motion in arrest of judgment, though some are defective. *Penniman v. Winner*, 2, 449

195. *Joinder of counts.*—A count for money had and received, may be joined with a count upon the deceit where the liability under either grows out of the same transaction. *Woodbury v. Deloss*, 12, 144

196. *Nonjoinder of all co-tenants.*—Plaintiffs being tenants in common, may maintain "an action for the recovery of the land without joining their co-tenants." *Morenhaut v. Wilson*, 1, 53

197. *Waste and ejectment, being legal remedies*, can only be maintained by the owner of the legal title. *Gillett v. Treganza*, 7, 432

198. *Action by shareholders against directors.*—Where mismanagement by directors of a corporation is so gross as to amount to fraud, a bill may be maintained against them personally by a shareholder. A shareholder may, under proper circumstances, interpose for the protection of the corporation. *Watt's Appeal*, 8, 223

199. *Misjoinder of causes of action.*—A cause of action on an official bond against the principal and his sureties can not be united with a cause of action for damages against the principal alone. *State of Nevada v. Kruttschnitt*, 14, 130

200. *Several action.*—Other persons purchased stock at the same time as the plaintiff, and under like circumstances: *Held*, the several contract of each, and that upon rescission the defrauded party alone was entitled to recover. *Burns v. McCabe*, 7, 1

201. *Misjoinder—Sundry counts—Facts of the case.*—Plaintiff sued five persons, all trustees of the corporation; one of the two counts on which he went to the jury was based upon alleged fraudulent representations by which plaintiff was induced to make loans to the company; the other count was upon the statute making officers personally liable for making false reports. The evidence would have justified a verdict against four of the defendants who had signed the report, but the fifth was not liable on that count because he had not signed the report, and was not liable under the other evidence upon the first count: *Held*, that a new trial must be had as to all the defendants. *Arthur v. Griswold*, 7, 46

AA. Pleadings in General.

202. *Verification—Information and belief.*—A verification which conforms to section 118 of the Practice Act of Nevada is sufficient, and that implies that averments may be made upon information and belief. *Sierra Nevada M. Co. v. Sears*, 7, 549

203. *The primary object of pleading* is to apprise the opposite party of the nature of the plaintiff's claim, or the defendant's defense; in other words, to apprise the opposite party of what he will be called upon to meet upon the trial. *Quincy Co. v. Hood*, 12, 148

PLEADING AND PRACTICE—Pleadings in General. *Continued.*

204. *Every essential fact issuable.*—It is an elementary rule of pleading that every fact essential to a cause of action is issuable, and must be proved upon the trial substantially as alleged, unless admitted by the defendant. *Id.*

205. *The construction of pleadings is for the court and not for the jury.* *Taylor v. Middleton,* 15, 284

206. *Pleadings strictly construed against the pleader.* *Foreman v. Bigelow,* 13, 269

207. *Averment of "compliance with the law" a legal conclusion.*—An allegation, in a specification of error, that an alleged locator had "fully complied with the laws and statutes of the United States, with reference to the location of placer mining claims," states a mere legal proposition, and points to no finding of fact. *Anthony v. Jillson,* 16, 26

208. *Surplusage in pleading.*—Where a complaint taken as a whole states a good cause of action, unnecessary statements and allegations may be regarded as surplusage. *Houtz v. Gisborn,* 2, 340

BB. Prayer.

209. *General relief.*—General relief should not be granted on a bill praying only the issuance of an injunction. *Boyle v. Laird,* 7, 301

210. *Prayer determines nature of action under code.* *Gillett v. Treganza,* 7, 432

211. *The case must support the specific relief prayed for.* *Laird v. Boyle,* 12, 83

212. *Scope of prayer for general relief.*—If a complainant mistake the relief to which he is entitled, the court may, under the prayer for general relief, adjust its decree to the full equity of the case. *Hamill v. Thompson,* 14, 697

213. *Prayer has no office under code pleading.* *Becker v. Pugh,* 15, 304

CC. Process.

214. *Service on agent without showing the fact of agency.* *Brown v. Gaston Co.,* 1, 376

215. *General agent.*—Service upon one in the employ of a company, but not its general managing agent, is not sufficient service on the company. *Id.*

DD. Remittitur.

216. *Costs.*—Damages in excess of the evidence may be remitted in the Appellate Court, the appellant being allowed his costs. *Cons. Gregory Co. v. Raber,* 1, 405

217. *Cause not remanded for nominal damages.*—A case will not be reversed and remanded to the lower court to direct a judgment for nominal damages in favor of appellant. *McCauley v. McKeig,* 16, 1

218. *Reversal of judgment operates ipso facto upon lower court.*—When the Supreme Court reverses the judgment of the lower court, and its mandate to that effect is filed in the lower court, the judgment

PLEADING AND PRACTICE—*Remittitur. Continued.*

is reversed, whether the lower court makes an order conforming its judgment to that of the higher court or not. *Reynolds v. Hosmer*, 4, 657

EE. Replication.

219. *Replication*.—All the allegations of an answer in chancery are to be taken as true where no replication has been filed, and the case is heard on bill and answer. *Von Schmidt v. Huntington*, 6, 284

FF. Trial—Reference—Jury.

220. *Assessment of damages by the clerk of court*. *Johnston v. Cowan*, 9, 299

221. *Rule as to affirming report of referee*.—If the report of a referee be unsupported by the evidence before him, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside; but if it is not against the evidence in the case, and no rule of law has been violated, it should stand. *Fitch v. Archibald*, 2, 555

222. *Rebuttal*.—After defendant has proved an adverse possession, the plaintiff may show that it was not continuous or uninterrupted, but may not return upon his original proof, unless in a case addressed to the discretion of the court. *Yankee Jim's Co. v. Crary*, 1, 196

223. *Evidence taken before substitution*.—Whether testimony taken before new parties are brought in, can be read on the hearing, depends on the circumstances, and was properly allowed in this case. *Vermont Co. v. Windham County Bank*, 3, 312

224. *Probate practice—Jury*.—Under the statute. (Gen. Laws, § 2918.) *Charles v. Eshelman*, 2, 65

225. *Jury of six*.—In the trial of issues of fact in the County Court of Colorado, a party who desires a trial by a jury of twelve must demand a jury of that number before the venire is issued, and if the record fails to show such demand, or a waiver of any jury, then a trial by a jury of six will be proper. *No. 5 Mining Co. v. Bruce*, 3, 146

226. *Jury trials in equitable proceedings*.—The remedy sought being equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. *Fabian v. Collins*, 5, 20

227. *Sending out papers with jury*.—As a general rule, with some exceptions, the sending out of papers with the jury is regulated by the sound discretion of the court trying the case. *Little Schuylkill Co. v. Richards*, 10, 661

228. *Statement sent out with jury*.—It was not error, where there was evidence of increased value to the premises by reason of the machinery and improvements, to permit the defendants to send out a statement with the jury. *Ege v. Kille*, 10, 213

229. *Memorandum from the judge to jury*.—Giving jury memorandum of plaintiff's claim against the wish of the opposing party, is error. *Burton v. Wilkes*, 3, 83

PLEADING AND PRACTICE. *Continued.*

GG. Variance—Waiver.

230. *Waiver of objections to bill.*—An objection to a supplemental bill in equity on the ground that it seeks to maintain the suit upon facts which have occurred since the filing of the original bill is waived by omitting to demur to it upon that ground, and consenting to go into a full hearing before a master upon the merits of the case as set forth in the original and supplemental bill. *Pinch v. Anthony*, 2, 593

231. *A party can not make out one case by his bill and another by his proof; they must correspond.* *Tuck v. Downing*, 7, 84

232. *Variance between statement and copy.*—The copy will control. *Watson Coal Co. v. Casteel*, 9, 130

233. *Waiver of demurrer.*—The defendant having first demurred and subsequently answered, and the record failing to show what was done with the demurrer, it will be presumed that it was abandoned. *Basey v. Gallagher*, 1, 683

234. *Appearance waives process.*—A general appearance waives any informality as to the process upon which parties are brought into court. *Houtz v. Gisborn*, 2, 340

HH. Verdict.

235. *Where a case resolves itself into a single question* upon which the jury are left to find as upon a question of fact, and their verdict is the same as the finding of the court should have been upon the same point treated as an issue at law, the result is well and without error. *Miller v. Chester Co.*, 16, 288

236. *Water rights—Verdict of jury.*—The question of diligence in making surveys and constructing ditches for the appropriation of water being submitted to a jury for the purpose of determining whether plaintiff's claim would date from the commencement of their operations, and the evidence being conflicting, their verdict was held to be conclusive. *Weaver v. Eureka Co.*, 1, 648

237. *Practice on submitting issues to jury in equity cases, stated.* *Stockbridge Co. v. Hudson Co.*, 13, 120

238. *Quotient verdict.*—An agreement among jurors to average amounts suggested by each juror. *Turner v. Tuolumne Co.*, 1, 107

239. *Affidavits of jurors can not impeach such a verdict.* it not being a chance verdict. *Id.*

240. *The Supreme Court will not disturb a verdict on the ground that it is against the evidence,* when the testimony is conflicting. *White v. Todd's Valley W. Co.*, 4, 537; *Brown v. Smith*, 4, 539; *Hixon v. Pixley*, 11, 555

241. *Verdict upon matter not in issue, treated as surplusage.* *McLaughlin v. Kelly*, 7, 416

242. *Verdict for plaintiff, when may be directed.*—Where neither the answer nor the evidence offered in support thereof, nor both together, amount to a defense, it is no error for the court to instruct the jury to find for the plaintiff. *Fort Scott Co. v. Sreeney*, 12, 166

243. *Directing verdict for defendant.*—If the evidence in any case,

PLEADING AND PRACTICE—Verdict. *Continued.*

when taken in the strongest light for the plaintiff, would yet be insufficient to support a verdict in his favor, the court should direct a verdict for the defendant. *Kielley v. Belcher Co.*, 10, 11

244. Verdict upon conflicting evidence will be maintained on review. *Hixon v. Pixley*, 11, 555

POSSESSION.

1. Facts amounting to possession. *Golden Fleece Co. v. Cable Co.*, 1, 120

2. Location notice without staking boundaries, does not amount either to constructive or actual possession. *Morenhaut v. Wilson*, 1, 53

3. Occupation from day to day, not essential. *Saterfield v. Randall*, 1, 219

4. Presumption arising from possession.—As against a mere trespasser, one in possession of a portion of public land will be presumed to be the owner. *Brandt v. Wheaton*, 1, 145

5. Forcible entry.—The writ of restitution obtained in an action of forcible entry and detainer simply decides a restoration to immediate possession, and does not decide the right of property or the right of possession. *Mitchell v. Hagood*, 1, 506

6. Title to mining lands.—The locator of a mining claim has the exclusive right to the possession and enjoyment of the same, and he has a legal, as distinguished from an equitable title. *Belk v. Meagher*, 1, 522

7. The possession of mining claims is regulated by usage and local rules and *possessio pedis* can scarcely be required to give a right of action for the invasion of it. When the limits of the claim are defined and one enters in pursuance of the mining rules or under color of title, the possession of a part as against any but the true owner or prior occupant is possession of the whole; nor would a third person have a right to invade such possession and set up title in a stranger with which he had no connection. *Attwood v. Fricot*, 2, 305

8. Qualified possession.—The possession of the owner of an easement is such qualified possession only as is essential to the enjoyment or assertion of the privilege. *Union Pet. Co. v. Bliven Pet. Co.*, 3, 107

9. A party in possession always has the right to buy his peace from one asserting an adverse claim. *Stonecifer v. Yellow Jacket Co.*, 3, 4

10. Right of party in possession to jury trial is imperative. *Id.*

11. Title by possession before discovery of mineral in place.—A prospector on the public mineral domain may protect himself in the possession of his claim while he is searching for mineral; but if he allows another to enter upon his claim, and first discover mineral in rock in place, the second comer will have the better title to the mineral. *Crossman v. Pendery*, 4, 431

12. Constructive possession, how proved. *Roberts v. Wilson*, 4, 498; *Hess v. Winder*, 12, 217

13. Possession of cultivated land not fenced.—Cultivation of land is an indication of possession, whether inclosed or not. *Barnes v. Sabron*, 4, 674

POSSESSION. *Continued.*

14. *A party in possession, under contract of purchase from the State, is entitled to all the incidents and protection due to ownership.* *Id.*

15. *Proof of possession is clear where one of two defendants had surrendered possession of the premises in controversy to the other.* *Burke v. Table Mountain Co.,* 5, 209

16. *Evidence of surrender of possession.*—An "agreement of cancellation" of a lease of a ditch and the surrender of possession to the lessor, although no consideration may have been expressed in the agreement, is sufficient to justify a finding that the tenant (defendant in ejectment) was not in possession of the premises. *Id.*

17. *The possession of public land necessary to support ejectment in favor of a party relying solely upon his prior possession must be an actual occupation.* *Coryell v. Cain,* 5, 226

18. *Presumption from possession.*—Prior possession of the plaintiff being established, he is presumed to have complied with all the requirements of the *lex loci* peculiar to that mining district, necessary to the acquisition of the title declared on. *Sears v. Taylor,* 5, 318

19. *Staking boundaries as proof of possession.*—The mere evidence of staking boundaries is not proof of possession, but it is proof of the extent of possession; and in the absence of a complete transcript, the court will presume sufficient evidence of plaintiff's possession was given. *Boardman v. Thompson,* 6, 240

20. *Possession of the subject of controversy is property.* *Brennan v. Gaston,* 7, 426

21. *Recorded surveys evidence of possession.*—*Burden of proof.*—Under the statutes of Nevada, in order to make certain surveys evidence of possession, it is a condition precedent that the surveyor's certificate should be recorded within thirty days from the date of its delivery, and the burden of proof is, in this case, held to be upon the plaintiff to show that the certificates were recorded in time. *Rivers v. Burbank,* 7, 564

22. *The rule that possession of a part is extended by construction to the whole of lands called for in paper title, does not apply to claims on the public domain held under an inoperative deed.* *Id.*

23. *Possession of public land—Insufficient boundaries.* *Id.*

24. *Facts amounting to possession and constructive notice.*—A purchaser at execution sale of mineral land has constructive notice of an outstanding lease where the lessee has possession; and he has possession so long as he is working the premises in a miner-like way—working steadily except when prevented by water, and leaving tools in the mine when absent. *Chamberlain v. Collinson,* 9, 86

25. *Possession and compromise as affected by threats.* *Id.*

26. *Possession in case of too extensive claim.*—Where the quantity of ground claimed is unreasonable, the possession under such a location will be restricted to the ground actually occupied. *Table Mt. Co. v. Stranahan,* 9, 457

27. *Definite findings, to support decree.*—The findings to support decree, based upon actual possession, must show that plaintiff had possession of a definite portion of the ground in controversy. *Gelcich v. Moriarty,* 9, 496

POSSESSION. *Continued.*

28. *Presumption of continued possession.*—Possession of a shaft being shown at one time, the burden of proof is upon the party who asserts that it did not continue. *Faxon v. Barnard*, 9, 516

29. *Actual possession of a mining claim.*—The purchaser of a mining claim properly located and marked on the ground, and engaged in working and developing the claim and in keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim—his possession is a *possessio pedis* extending to the boundary lines of the claim. *North Noonday Co. v. Orient Co.*, 9, 531

30. *Possession of surface owner extended to mines, after severance.*—Where plaintiff's ancestor had severed and sold a clay bank which was afterward abandoned by his grantee: *Hell*, that "the possession of the surface which the plaintiff then had would thereafter extend to the clay pit." *Stratton v. Lyons*, 10, 814

31. *No constructive notice from possession retained by grantor.*—The continued possession of a mining claim by the grantor after he had conveyed the legal title, would not be notice to a subsequent purchaser of any unrecorded defeasance held by such grantor. (*HAWLEY, J.*) *Brophy Co. v. Brophy Co.*, 10, 602

32. *Possession of land shown by use.*—Where a party claiming a small strip of land on the bank of a creek, constructed and maintained a bridge over the creek abutting on the premises, it was held, that this use of the land was sufficient evidence of possession to maintain ejectment. *Quicksilver Co. v. Hicks*, 11, 98

33. *Verdict—Possession as a question of fact not disturbed.* *Jackson v. McMurray*, 12, 164

34. *Possession extends to bounds claimed in title papers.* *Harris v. Equator Co.*, 12, 178; *Table Mt. Co. v. Stranahan*, 9, 457; *Hess v. Winder*, 12, 217; *Attwood v. Fricot*, 2, 805

35. *Possession proved by admissions.* *Wild v. Holt*, 12, 182

36. *Mining amounts to possession—Disseizee may not recover mesne profits before re-entry.* *West v. Lanier*, 12, 184

37. *Working one seam, evidence of possession of overlying seam.* *Turner v. Reynolds*, 12, 190

38. *Admission of certificates of stock, to prove possession.* *Pennsylvania Co. v. Owens*, 12, 200

39. *Prior possession without location.*—Though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still a prior possession, not so taken, is good as against one subsequently taking possession in the same way. *English v. Johnson*, 12, 202

40. *The acts required as evidence of the possession of a mining claim are those usually exercised.* *Id.*

41. *Pedis possessio.*—Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy, or work done, be only on a part. The rule which applies to agricultural lands, and requires a more strict interpretation of a *possessio pedis*, does not apply to mines. *Id.*

POSSESSION. *Continued.*

42. *Possession without proof of location.*—A plaintiff need not show, in ejectment, in the first instance, that he had a possession taken in accordance with local laws, but may rely upon proof of the possession alone, until defendant shows that such possession was wrongful. *Id.*

43. *Possession of land as title.*—A party in possession of public mineral land is entitled to hold it as against all the world—the government excepted, if the land belong to it—subject only to the qualification that upon land taken up for other than mining purposes, a right of entry for such purposes may attach. *Lentz v. Victor*, 12, 212

44. *Possession is good till better right shown.* *Hawthurst v. Lander*, 12, 214

45. *Prior possession superior to statutory right.*—Proceedings in accordance with the statute, to acquire a possessory right to land, would not give a right to recover their possession as against one who was then in the actual possession of it. *Id.*

46. *Actual occupancy of part of claim.* *Hess v. Winder*, 12, 217

47. *Priority gives the better title.* *Gibson v. Puchta*, 12, 227

48. *Previous mining by strangers.*—When there is a question of priority between a mining claim and an agricultural claim, proof that the lands had been previously occupied for mining purposes by parties with whom or whose title the present claimants of the ground for mining purposes do not pretend to connect themselves, is of no avail to the present claimants. *Levaroni v. Miller*, 12, 233

49. *A constructive possession is sufficient to maintain trespass.* *Courchaine v. Bullion Co.*, 12, 235

50. *Possession yields to title—Paramount proprietor.* *Id.*

51. *Actual possession by each party on opposite sides of disputed gore.* *Maine Boys T. Co. v. Boston Co.*, 12, 247

52. *Possession as evidence of title against trespasser.*—In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction is *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. *Campbell v. Rankin*, 12, 257; *Courchaine v. Bullion Co.*, 12, 235

53. *Entry upon another's possession, when wrongful and when allowable.* *Phenix Mill v. Lawrence*, 12, 261

54. *Title prior to record.*—While holding possession, for the purpose of making the development required by law, the locator's right to the lode is complete, and it can be conveyed by deed. *Murley v. Ennis*, 12, 360

55. *Idem—Abandonment.*—It may nevertheless be lost by abandonment, or yielding possession to another, which is the same thing. *Id.*

56. *Idem—Admitting new party into possession.*—And so if the locator admits another into possession with him, this will amount to an abandonment *pro tanto*, and a retaking by the party admitted, upon which they will become interested in the lode, jointly or otherwise, according to the terms of their agreement. *Id.*

57. *Idem—There is no distinction as to re-located claim.* *Id.*

58. *Possession as proof of title.*—The possession of agricultural land is *prima facie* proof of title against a trespasser; but where it is

POSSESSION. *Continued.*

shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge v. Smith*, 12, 448

59. *Prospect holes* do not amount to actual possession. *Pralus v. Jefferson Co.*, 12, 478

60. *Constructive possession under district rules.*—There can be no constructive possession of mining claims upon the public domain except under district rules. *Id.*

61. *Domestic occupation not evidence of possession as mineral land.* *Maxon v. Wilkinson*, 12, 603

62. *Scrambling possession.*—Two parties can not be in possession of the same lead ore diggings holding adversely to each other, the one rightfully, the other tortiously. *Ecker v. Moore*, 12, 686

63. *What is sufficient possession of mining claim.*—The possession of one claiming under a parol sale, or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or its equivalent. *Patterson v. Keystone Co.*, 13, 169

64. *The possession of a claim by a company* is the possession by each one of its members of his individual share. *Patterson v. Keystone Co.*, 13, 171

65. *Claim held by occupancy—Trespass based on possession.*—A party who enters upon vacant public land, makes a survey and record, marks the boundaries of his claim, builds a cabin thereon for storing tools, and continuously thereafter engages in digging and milling the tailings which had been deposited on the land from the quartz mills above, thereby acquires such a possessory right to the land as will enable him to maintain trespass against an intruder who enters upon the land and begins to remove such tailings. *Rogers v. Cooney*, 14, 85

66. *Possession of a mine by a drift* is possession to all depths and of all levels from the surface to the center of the earth. *Hugunin v. McCunniff*, 14, 468

67. *Constructive possession always yields* to a possession in fact incompatible with the implication of law which creates it. *Id.*

68. *Double possession.*—The law will decide which is rightful. *Mather v. Trinity Church*, 14, 472

69. *Possession under contract.*—Parties can not take and hold possession of a mining claim as vendees and be upheld in refusing compliance with their contract made in consideration of their receiving such possession and the right thereto. *Hitchens v. Nougues*, 14, 649

70. *Transfer of possession without deed.*—A locator takes as by grant from the government, and the thing granted is real estate, and should be conveyed by deed; hence, proof of possession of a mining claim, without any valid location, and of transfer of possession by mere delivery, is immaterial in a suit where the right to possession is contested, and should be excluded. *Hopkins v. Noyes*, 15, 287

71. *A finding that a party is in possession*, in a suit supporting an adverse claim, is not necessary where the facts found show a lawful location and a right to the possession. *Eilers v. Boatman*, 15, 468

PRESCRIPTION.

1. *Estate distinguished from easement.* *Wilkinson v. Proud*, 12, 269
2. *Prescription distinguished from adverse possession.* *Caldwell v. Copeland*, 1, 189

PRINCIPAL AND SURETY.

1. *Practice—Suit on indemnity bond.*—The obligee in a bond to indemnify against claims may sue as soon as a claim is made, without waiting for judgment or even till a suit be commenced. *Ardesco Oil Co. v. North American Co.*, 8, 589
2. *Indemnity to surety is indemnity to principal.* *Rice's Appeal*, 3, 639

PROBATE.

1. *Suit for unprobated claim, may be maintained.* *Ray v. Hodge*, 15, 371

PROCESS.

1. *Constructive service of summons.*—A party relying solely upon a constructive service of summons is bound to prove a strict compliance with some of the modes prescribed by the statute for obtaining such service. *Scorpion Co. v. Marsano*, 12, 502
2. *Service of summons on business manager.* *Id.*
3. *Idem.*—Courts must know, and officers must be presumed to know, what the legislature meant by the term "managing agent;" but courts can not know what an officer means by a designation unknown to the law. *Id.*
4. *Publication of summons—Deposit in postoffice.*—Where a party relies upon the publication of summons, it is necessary not only to publish a copy, but to deposit another copy in the postoffice, directed to the defendant at his place of residence, if known; and the statute prescribes that such deposit shall be proved by affidavit. *Id.*
5. *Deposit in postoffice must be addressed to defendant.* *Id.*

PRODUCTION OF PAPERS.

1. *Where, during the progress of a trial, defendant's counsel, on being asked by plaintiff to produce a certain paper, promises to look for it, and bring it into court if found, and the plaintiff's counsel does not again call the matter to the attention of the court, the right to insist on the production of the paper, or introduce secondary evidence of its contents, is waived.* *Cheesman v. Hart*, 16, 363

PROSPECTING CONTRACT.

1. *Parties to prospecting contract are tenants in common.* *Gore v. McBrayer*, 1, 645
2. *What is sufficient search on contract to prospect for coal.* *Hanson v. Boothman*, 2, 217; *Skidmore v. Elkensberry*, 15, 366
3. *Executed and executory.*—Where plaintiffs, mine owners, conveyed an interest in their mines to defendants, in consideration of a contract signed by defendants, to open the mines, etc., it is a contract executed by the plaintiffs, executory by the defendants, and such contract is valid against the defendants, though not signed by the plaintiffs. *Luckhart v. Ogden*, 2, 601

PROSPECTING CONTRACT. *Continued.*

4. *Prospecting drill contract—Abandonment after assured indications of no coal.* *Lambert v. Fuller*, 3, 203

5. *Contract to prospect for coal not carried out by defendants who, holding the land, were sued by plaintiff for annual rent: Held*, that if there was no minable coal on the land plaintiff could not recover, but that the burden of proof was on the defendants to prove such fact which they could not do without making the development called for by the contract. *Cook v. Andrews*, 3, 171

6. *Reasonable time to prospect.*—Where a conveyance was to be made of land if the vendee should find oil upon it, it is to be construed that oil must be found within a reasonable time. *Dark v. Johnston*, 9, 288

7. *Prospecting arrangement between claimant and adventurer.*—An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will give his labor to develop the mine, the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, followed by a joint working of the mine and sharing the profits by the parties, constitutes one of those qualified partnerships common in California known as mining partnerships. *Sesembre v. Putnam*, 11, 425

8. *Adventurer entitled to conveyance.*—Such a contract resulting in success entitles the adventurer to his proper share in the property. *Id.*

9. *Oral agreement for locating lodes—Statute of Frauds.*—If three persons enter into an oral agreement of copartnership in the business of prospecting and discovering quartz claims, and of acquiring title thereto for the mutual benefit of the copartners, such contract is not within the Statute of Frauds. *Hirbour v. Reading*, 11, 514

10. *Outfitters and adventurers—Distribution of profits between.* *Scott v. Clark*, 12, 276

11. *Profits after disbanding.*—While the company was in existence and working an old claim, they located a new claim; but were only able to do enough work to hold it, the season not permitting active mining; after the dissolution Clark worked this claim and cleared \$1,000, which was held not within the contract. *Id.*

12. *Prospector engaging in other business.* *Waring v. Cram*, 12, 280

13. *Traveling expenses on prospecting adventure.* *Thompson v. Prouty*, 12, 290

14. *Consideration of the items to be allowed on such accounting, as to wearing apparel, the original advance of \$500, etc.* *Id.*

15. *Infant can not rescind executed contract.* *Breed v. Judd*, 12, 293

16. *Liquidated damages for breach of the contract.* *Cotheal v. Talmage*, 12, 299

17. *Time fixed by context of contract.*—Defendant Smith agreed with plaintiffs, in consideration of a fund in money advanced, to sail for California, to forward provisions for two years and tools for digging gold, and to commence digging as soon as possible on arrival, and remit to plaintiffs one-fourth of the proceeds. *Held*, that the contract bound him to dig for gold for the full period of two years. *Hoyt v. Smith*, 12, 306

PROSPECTING CONTRACT. *Continued.*

18. *Prospector embarking in other business obliged to a discovery.*
Hoyt v. Smith, 12, 306

19. *Gold digging contract construed.*—A contract requiring a party to dig gold during a certain period, can not be construed to require the party making such agreement to account for money earned during the period called for in the contract in other business. *Hoyt v. Smith,* 12, 315

20. *Amendment showing consideration for prospector engaging in other business, allowed.* *Hoyt v. Smith,* 12, 321

21. *Consent to change of business.*—Where a party who had engaged to dig for gold for the benefit of himself and the outfitting adventurers, engaged in other business during the period during which he was bound to be mining, with the consent of the outfitters to his quitting the mines and embarking in other business, *held,* that such consent was a sufficient consideration for the promise of such party to account for the profits of such other business. *Hoyt v. Smith,* 12, 325

22. *Statement of terms of the prospecting arrangement—Holding, as to the relation of the parties—Unauthorized disbanding.*—Where several persons form an association, by the subscription of stock and the adoption of a constitution, to procure gold from the mines of California, and agree to send eight persons, to be selected from their number, to labor in obtaining such gold, under an agreement to furnish them with outfits and money for their expenses, and on their return to have an account and division of the articles of value which they may acquire—*held,* that the persons thus selected to labor for the association, though members, stood also in the relation of employes of the association, and their refusal, after arriving in California, to work together, and the partition among themselves of the property of the association with a view of aiding their separate and independent labors, do not work a dissolution of the association, nor discharge them from the obligations to it under their contract. *Eagle v. Bucher,* 12, 330

23. *Idem—Prospector can not sever his relations at will.* *Id.*

24. *Idem—Prospector compelled to account—Election of remedies against him.* *Id.*

25. *Idem—Prospector not accounting, excluded from distribution.* *Id.*

26. *Abandonment of adventure by associates—Obligations to out-fitter.* *Harvey v. Coffin,* 12, 336

27. *Contract for share of net earnings construed—Prospector not liable for unavoidable losses.* *Pierce v. Bucklin,* 12, 340

28. *Oil prospecting contract—Suspensive and potestative condition.* *Escoubas v. Louisiana Co.,* 12, 344

29. *Prospecting partnership construed.*—Plaintiffs furnished to certain miners money and provisions, in consideration that the miners would locate claims for the plaintiffs when they made a discovery. *Held,* that this contract constituted a mining partnership within the meaning of the following district rule: "That no claim shall be recognized as legally held unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the dis-

PROSPECTING CONTRACT. *Continued.*

coverers for their prospective partners." *Held further*, that plaintiffs could maintain an action for the possession of a claim located for them in pursuance of such contract. *Boucher v. Mulverhill*, 12, 350

80. *Prospecting contract not a commercial partnership. Id.*

81. *Contract for report upon mines construed—Expenses of agent employed to advise on investments. Duff v. Maguire*, 12, 353

82. *Prospecting contract need not be in writing. Murley v. Ennis*, 12, 360

83. *Outfitter failing to keep up supplies, the prospector may abandon. Id.*

84. *Remedy when prospector has transferred the entire title.—If one in possession of a lode, holding for himself and another, make a sale of the property, the latter may bring ejectment against the purchaser for his part, or he may affirm the sale and sue his associate in assumpsit for his part of the purchase money. Id.*

85. *Analysis of the consideration in prospecting contract, and the miner's risk, held a just equivalent to the owner's title. North Ga. Co. v. Latimer*, 12, 367

86. *Nature of prospecting contract.—An agreement to engage in the business of prospecting for and the development of lode mining property, for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other. Lawrence v. Robinson*, 12, 387

87. *Determinable at pleasure, where no time of duration is limited by such agreement. Id.*

88. *Form of complaint by outfitter against prospector, set forth at length in statement. Id.*

89. *"Grub Stake" contract—Arrangement must continue to time of discovery.—The partnership association, or association between parties who may be engaged in prosecuting explorations on the public lands for mines, must exist at the time of the location and discovery in order to give the parties, other than the discoverer, an interest in the property. Johnstone v. Robinson*, 12, 396

40. *Same prospector contracting with third party.—Held*, that the making of the arrangement with R. was an abandonment of the agreement with B., and that the latter could not share in the interest of A. in the property discovered and located under the new arrangement. *Id.*

41. *Prospecting contracts specifically enforced.—Plaintiff showed float which he had found to defendant and defendant commenced to prospect for the lode upon joint account, and when he had found it, he recorded it in his own name. Upon findings by the jury to this effect, decree for conveyance was affirmed. Sears v. Collins*, 12, 400

42. *Implied promise of prospector to convey, without demand. Welland v. Huber*, 13, 364

43. *Prospecting contract rescinded between discovery and location.—Where an agreement to prospect for and locate lodes for the benefit of all the parties thereto has been dissolved by mutual consent, none of the parties are under obligation to complete locations already in-*

PROSPECTING CONTRACT. *Continued.*

initiated, for the benefit of the concern. And, if some of them do so, the locations are for their sole benefit. *Page v. Summers*, 15, 617

44. *Sufficient proof of abandonment of prospecting contract.*—Proof of negotiations for an abandonment is insufficient to establish a rescission. But, under the testimony, the finding that the arrangement had been discarded before the making of the discovery in question, was upheld. *Chadbourne v. Davis*, 15, 620

45. *Concealing discoveries from outfitter.*—After a dissolution of the partnership arrangement they sold these claims for a large price: *Held*, that they were bound to account for plaintiff's proportion of the purchase money. *Jennings v. Rickard*, 15, 624

46. *A prospector discovered "float," but did not find the lode from which it came until after a dissolution of the prospecting partnership:* *Held*, that his failure to follow up the prospect during the partnership would not of itself raise any inference of fraudulent behavior nor entitle his associates to share in the lode when afterward found. *Id.*

PROSPECTUS.

1. *Board of directors—Fraud.*—In an action by a company for calls, plea that the defendant was induced to become a holder of shares by means of the fraud of the plaintiffs, *Held*: 1. That fraud of the directors as a board, and as a body, was fraud within the plea, and would avoid the contract. 2. That the publication by the directors of statements in their prospectus false in fact and calculated to mislead the public, if careless whether their statements were true or false, would amount to fraud. 3. That this would not the less be so, merely because the prospectus referred to reports of surveyors which had in fact been received, and might have been referred to by the shareholders, if in point of fact they relied upon and were influenced by the prospectus. *Glamorganshire Co. v. Irvine*, 6, 565

2. *Recklessness amounting to fraud.*—The publication by the directors of a prospectus prepared by the attorneys, the main promoters, without referring to the reports, or taking any pains to verify its statements, was evidence of such recklessness as would tend to show fraud within the above definition. *Id.*

3. *Responsibility for prospectus.*—A director of a corporation who knowingly issues or sanctions the circulation of a prospectus containing material mis-statements is liable in damages to a party induced to purchase stock by the contents of such prospectus. *Morgan v. Skiddy*, 7, 74

4. *Misrepresentation not relied on* can not be pleaded to void a contract. *Jennings v. Broughton*, 12, 405

5. *Departure from prospectus—Enjoining action for calls.*—A company was formed for mining purposes; the prospectus referred to the memorandum and articles, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterward found to be worthless, and the directors rescinded the contract, and agreed to purchase another. *Held*, that a shareholder who has subscribed on the faith of the prospectus, was entitled

PROSPECTUS. *Continued.*

to an injunction against an action for calls, although the directors had been themselves deceived, and had been guilty of no willful fraud.

Smith v. Resse River Co., 12, 415

6. *Company not bound to secure all property mentioned in prospectus. Kelsey v. N. Light Co.*, 13, 498

PUBLIC DOMAIN.

1. *Territorial sovereignty considered. Territory v. Lee*, 6, 248

2. *Liberal construction to be made of the statutory grant to miners. Robertson v. Smith*, 7, 196

3. *The right to explore the mineral lands implies the right to extract the minerals when found. Id.*

4. *The fee in possessory claims remains in the United States, but the rights of miners have been carved out of it. Id.*

5. *Implied license; right of holder to protect his claim.* Under the legislation and implied license of the State and of the United States, the owner of a mining claim has a good vested title to the property, and it should be so treated until his title is divested by the exercise of the higher right of the superior proprietor; and in the meantime his right to protect the property is as full and perfect as if he were the tenant of the superior proprietor. *Merced M. Co. v. Fremont*, 7, 813

6. *Title of the U. S. in minerals.*—Under the treaty of Guadalupe Hidalgo, the United States acquired title to the minerals, and they have not dedicated them to the public. *U. S. v. Parrott*, 7, 336

7. *The government has an unqualified right to dispose of the public land; a stream of running water is part and parcel of the land through which it flows. Union M. Co. v. Ferris*, 8, 91

8. *Vested rights in mineral lands.*—One who makes a valid location of a mineral lode and complies with the mining laws, local and national, obtains a vested right to such property, of which he can not be divested. *Blake v. Butte M. Co.*, 9, 503

9. *The rights of the miners in California.*—There was never (prior to 1866) any license from the government to the miners on the Pacific Coast to work the mines. Congress had adopted no specific action on the subject. The supposed license consisted in the forbearance of the government. In controversies between parties on government land, where neither have absolute rights, the presumption of a grant to the first appropriator is simply a rule of convenience, having no place for consideration as against the superior proprietor. *Boggs v. Merced Co.*, 10, 335

10. *Government entry upon private lands.*—The United States could not enter nor authorize an entry upon private property for the purpose of extracting minerals. The United States, like any other proprietor, could only exercise the rights to the minerals in private property in subordination to such rules and regulations as the local sovereign might prescribe. *Id.*

11. *The miner's right a pre-emption. 420 M. Co. v. Bullion Co.*, 11, 608

12. *Idem—Not a bounty.*—The right of purchase under the United States mining acts is not a bounty. *Id.*

PUBLIC DOMAIN. *Continued.*

13. *Miners not actual settlers.*—The eleventh section of the act "for the protection of actual settlers," etc., can not be invoked by miners engaged simply in extracting gold from a quartz vein. *Fremont v. Seals*, 11, 633

14. *By the Mining Act of 1866*, the general government extended to all in possession of mining claims, and to all subsequently locating and denouncing mines containing the precious metals, a guaranty of protection in their occupancy so long as the mines are operated and worked. *Gold Hill Co. v. Ish*, 11, 635

15. *Ownership of mines not a right of sovereignty.* *Moore v. Smaw*, 12, 418

16. *Sovereignty and prerogative distinguished.* *Id.*

17. *President no power to let mines.* *Lorimier v. Lewis*, 12, 497

18. *Statutory precedence of miner's rights.*—By statute in California a person who settles for agricultural purposes upon any of the mining lands of the State, settles upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals to be found in the lands so occupied by the settler in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant. *McClintock v. Bryden*, 12, 443

19. *Mineral land excepted in pre-emption acts.*—Neither the act of 1858, as to the location of seminary land, nor the act of Congress donating it, allows mineral land to be located. *Burdge v. Smith*, 12, 448

20. *Presumption that land is public* until legal title shows the reverse. *Id.*

21. *Idem—Presumption from possession.*—This presumption is reconcilable with the presumption of title arising from possession. *Id.*

22. *"Vested rights" construed.*—When a statute provides for the protection of vested rights, it means rights lawfully vested, and this excludes the protection of locations of salines, which are reserved from sale or entry. *Morton v. Nebraska*, 12, 461

23. *Object of entry on lead lands always admissible* in an action of trespass by the United States. *U. S. v. Gear*, 14, 408

QUARRY.

1. *Face of quarry is necessarily irregular.*—A lease stating "that said quarry shall be worked as the face is now opened," is not violated by quarrying one of the faces to a greater extent than another, and such quarrying will not be enjoined if the same general shape is preserved. *Keeler v. Green*, 12, 465

QUIET TITLE.

1. *A bill to quiet title will lie in favor of the possessor of a ditch.* *Head v. Fordyce*, 12, 470

2. *What amounts to cloud.*—A decree alleged to be supported by a lien elder to plaintiff's title, is a cloud upon such title. *Id.*

3. *Any description of claim* may be the subject of a cloud on title, and is relievable by bill to set it aside. *Id.*

4. *General rule as to the right to bring the action.*—Plaintiff has a right to be quieted in his title whenever any claim is made to real

QUIET TITLE. *Continued.*

estate of which he is in possession, the effect of which claim might be litigation, or a loss to him of the property. *Id.*

5. *Burden of proof on plaintiff—Insufficient findings.*—A plaintiff seeking to set aside a decree foreclosing a lien as a cloud upon his title, must show affirmatively that defendant had no claim on the property, and if the findings are insufficient for the court to determine whether the defendant had any lien, the judgment in favor of plaintiff will be reversed that the cause may be fully tried. *Id.*

6. *Possession of claim, necessary to maintain action.* *Pralus v. Jefferson Co.*, 12, 478

7. *A possessory title is sufficient to maintain an action to quiet title to a claim upon the public domain.* *Pralus v. Pacific Co.*, 12, 478

8. *Idem—Sufficient averment of injury.*—In such action an averment that plaintiffs were greatly embarrassed in the enjoyment of their mining claim and their interest therein greatly depreciated by reason of the possibility of there being title in the defendant as he falsely asserted, is a sufficient averment of injury under the statute, to sustain the action. *Id.*

9. *Tenant in common against co-tenant.*—One tenant in common of a mining claim, in actual possession, may maintain an action, under the Practice Act, to determine the validity of an adverse title purchased by a co-tenant. *Ross v. Heintzen*, 12, 488

10. *Facts of the case—Sale of co-tenant's interest—Partnership debts.*—A mine and mill were owned and worked in partnership by M. and S. who held two-thirds, and C. and Y., who held the other third; M. and S. conveyed by deed their two-thirds interest to plaintiff, who at once took their place as co-tenant in possession, but paid only a small part of the purchase price. At the date of such conveyance the company was indebted, and upon such indebtedness judgment was obtained against all the original owners, and in due course their entire interest in the property was sold to the defendant by sheriff's deed: *Held*, in an action to quiet title brought by the grantee of M. and S., that he had acquired their original two-thirds interest, and that the vendee at sheriff's sale acquired thereby only the one-third interest of C. and Y. *Id.*

11. *Whenever an instrument exists which may be vexatiously used against a party after the evidence to impeach it has been lost, or which may throw a cloud over the title, and he can not immediately protect his right by any proceedings at law, equity will afford relief by directing the instrument to be delivered up to be canceled, or such other decree as justice or the rights of the party may require.* *Stewart's Appeal*, 12, 491

12. *Defendant must plead and prove his title.* *Scorpion Co. v. Marsano*, 12, 503

QUO WARRANTO.

1. *Amotion.*—A court of equity can not remove the ministerial officers of a corporation. *Neall v. Hill*, 1, 80

2. *Usurpation of office, etc.*—The right to an office in a company can not be tried on application for injunction, nor can it restore an officer

QUO WARRANTO. *Continued.*

to his position, nor can it remedy the removal of a company officer after the removal has been already made. *Sherman v. Clark*, 7, 488

8. *Use of abbreviated name.*—The use of an abbreviated name, "Ophir Copper, Silver and Gold Mining Company," instead of the real corporate name, "Ophir Copper, Silver and Gold Mining Company, of Placer County, California," is not a usurpation, and will not support a proceeding to oust it of its franchises. *People v. Bogart*, 12, 513

4. *Illegal election of trustees.* *State v. Pettineli*, 12, 513

5. *Illegal officer ousted by quo warranto.*—Upon an information in the nature of a *quo warranto*, if it appears that respondent is unlawfully exercising the office of trustee of a corporation, judgment will be entered that he be ousted and excluded from the office. *Id.*

6. *Quo warranto to correct abuse of eminent domain.* *People v. R. R. Co.*, 12, 518

7. *Relief through attorney-general.*—It was competent for the State, upon discovering the misuse of its authority, to interpose by its attorney-general to correct the abuse. *Id.*

RAILROADS.

1. *U. S. grants to Pacific R. R.*—The Pacific railroad companies take the lands granted to them by the acts of Congress of 1862 and 1864, subject to ditch rights vested prior to the Mining Act of July 26, 1866, where, under the provisional terms of those grants, the equity of the grantee had not vested; and such equity did not vest before the certificate called for in the acts had been made by commissioners as to the completion of each section of forty miles. *Broder v. Natoma M. Co.*, 4, 671

2. *No right to surface support where company refuses to purchase minerals.* *Fletcher v. G. W. Ry. Co.*, 12, 521

3. *A railroad held to pass on sale of iron works as an improvement.* *Wright v. Chestnut Co.*, 12, 528

4. *Right of way goes with the road.* *Id.*

5. *Contracts with colliery made with reference to transportation.—Price made dependent on freight.*—In a contract for the delivery of coal the colliery company stipulated for an advance in price, if any advance on freight and tolls accrued before a time fixed. The company had a right to be paid for any such increase by the most usual and ordinary mode. *Lovering v. Buck Mt. Co.*, 12, 535

6. *Idem—Tender.*—The offer to furnish coal on the basis of the contract, including advance on freight and tolls, if refused, was a sufficient compliance by the company. *Id.*

7. *Pipe line under roadbed.*—A railroad does not take the land condemned for its use in fee. This remains to the original owner, who may lawfully enter upon the roadbed and lay a pipe line for the carriage of oil under the railroad. *Hassen v. Oil Co.*, 12, 547

8. *Injunction.*—An interference with the exercise of such right may be prevented by injunction. *Id.*

9. *Condemnation of mining railroad by passenger line.—Damages to ore bed are to be considered in award of damages.* *In Re Poughkeepsie R. R.*, 12, 553

RAILROADS. Continued.

10. *Breach of covenant to remove railroad.*—If a railroad company covenants with the owner of land, upon notice, to remove the railroad to another location on the same land, so as to permit the coal thereunder to be mined, but upon notice refuses to perform its covenant, a specific performance can not be compelled, but the railroad will be liable in damages for the breach of its covenant. *Mine Hill R. R. v. Lippincott*, 12, 555

11. *Idem*—Measure of damages—Apportionment of damages between landlord and tenant. *Id.*

12. *Facts of the case*—Railway company mining and breaking barriers.—Plaintiffs, owners of a coal mine, claimed damages against the owner of an adjoining mine for breaking down their barriers and working across the bounds. The wrongful acts were committed in 1863, while such adjoining mine was worked by the Hartlepool Railway Company. The boundaries of the two mines had been settled by mutual agreement, in 1862, and after lengthy negotiations, a mutual release was executed in 1864, by which all wrongful acts of both sides, were condoned. In 1868, an act of Parliament was passed, under which said Hartlepool Railway Company were to sell their mines within five years, and in 1865, it was amalgamated with the defendant company, and all its assets and liabilities transferred to them: *Held*

a. *Mining ultra vires*—Responsibility of corporate successor—That although it was *ultra vires* of the railway company to work mines, the act of 1863 implied that the company were to work their mines until sold, and that upon the amalgamation with the defendant company, the latter became liable for the wrongful act of their predecessors.

b. *Breach of faith avoids release.*

c. *Statute of Limitations, where facts not known.*—That the Statute of Limitations did not begin to run until the time of the discovery of the wrongful acts, there being no *laches* attributable to the plaintiffs for not having discovered the damages prior to 1870, two years before the filing of the bill. *Ecc. Com'rs v. N. E. Ry. Co.*, 12, 609

RATIFICATION.

1. *An unconscionable arrangement will not be disturbed* when there has been a ratification of it with knowledge of all its bearings, after time has been had for consideration. *Kent v. Quicksilver Co.*, 4, 48

See AGENT.

REAL ESTATE.

1. *The "Connecticut Title" to lands in the "17 townships" of Luzerne county considered.* *Griffin v. Fellows*, 8, 657

2. *Mining claims are real estate within the Practice Act defining the venue in civil acts.* *Watts v. White*, 13, 11

3. *Title passes to the owner of the realty, where personalty, though got by tort, is annexed to the realty.* *Jackson v. Walton*, 14, 488

RECEIVER.

1. *Receiver preferable to injunction* in case of mines, both from

RECEIVER. *Continued.*

public and private policy. *Deep River Co. v. Fox*, 1, 296; *Hill v. Taylor*, 12, 568; *Parker v. Parker*, 12, 596

2. *Appointment of a receiver for corporation.*—Courts of equity have no power to appoint a receiver for a corporation in the absence of a statute conferring such power. *Davis v. Flagstaff Co.*, 2, 661

3. *Order appointing receiver—When not reviewed.*—An order made after final judgment directing a receiver to pay over profits to the prevailing party, is a proceeding auxiliary to a suit to recover the premises, and on appeal from such an order the Supreme Court will not review the order appointing a receiver. *Whitney v. Buckman*, 10, 428

4. *Property in hands of receiver—Presumption.*—It is not error for a court to refuse to have issues framed and submitted to a jury to ascertain the value of property put into the hands of a receiver, and the ownership thereof. It will be presumed that the judge informed himself as to what he placed in the hands of the receiver, and it will not be presumed that the referee transcended his authority. *Id.*

5. *Manager.*—The power of the court to appoint a manager of works and mines as a trading concern, pending final decree, stated. *Crawshaw v. Maule*, 11, 228

6. *No receiver in a doubtful case.*—The appointment of a receiver is the exercise of a power in aid of a proceeding in equity, and is the subject of sound discretion. The court must be convinced that it is needful and the appropriate means to a proper end. It is a strong measure, and can not be exercised doubtingly. *Chicago Co. v. U. S. Co.*, 12, 571

7. *No receiver to oust lessee.* *Id.*

8. *No receiver to aid forciture.* *Id.*

9. *A receiver of a mine ought not to be appointed in a case which would involve a stoppage of the work, where neither insolvency nor mismanagement are charged against the defendants.* *Carter v. Hoke*, 12, 579

10. *Personal liability continuing after appointment of receiver.*—Where plaintiffs agree to furnish ore daily to a furnace during a certain period, and while furnishing such ore a receiver was appointed for the firm owning the furnace, at the instance and for the benefit of one of the members of the furnace company, *it was held*, that the original contracting parties continued liable for the ore furnished to the receiver. *Curtin v. Munford*, 12, 585

11. *The appointment of a receiver in one State* does not operate to pass title to such receiver in property of the corporation situated in another State; and either its creditors or the corporation itself can dispose of such property unaffected by the appointment of such receiver. *Simpkins v. Smith Co.*, 12, 589

12. *Appointment of receiver of colliery, pending suit to rescind.* *Gibbs v. David*, 12, 591

13. *Receiver during period of mortgage redemption.* *Hill v. Taylor*, 12, 568

14. *Receiver not prayed for.*—In a proper case a receiver may be appointed where the application of the plaintiff was for an injunction. *Parker v. Parker*, 12, 596

RECEIVER. *Continued.*

15. *Receiver pending ejectment.*—A court of equity will not appoint a receiver to take charge of oil property pending an action of ejectment therefor. *Enterprise Co.'s App.*, 12, 599
16. *Insolvency—Allowance for charges.*—A receiver ought not to be appointed in a proceeding for the partition of property theretofore left in the hands of one of the parties to manage in the common interest, if there is no allegation against him of insolvency; but if he objects to the appointment of a receiver he can not, pending further proceedings, charge for his services. *Pierce v. Pierce*, 15, 675
17. *The Circuit Court may properly instruct a receiver as to the management of property*, upon petition filed by him in the suit in which he is appointed. *Wilmington M. Co. v. Allen*, 9, 106
18. *Discretion of court where a going mine is in litigation.* *Id.*

RECEIVER'S RECEIPT.

1. *The receiver's receipt*, uncanceled, is equivalent to a patent so far as the rights of third parties are concerned. *Aurora Hill Co. v. S. M. Co.*, 15, 581

See PATENT, RELATION.

RECORD.

1. *Record of location*—Description sufficient to locate required by local law. *Golden Fleece Co. v. Cable Co.*, 1, 120; *North Noonday Co. v. Orient Co.*, 9, 530; *Southern Co. v. Europa Co.*, 9, 518
2. *Records as evidence.*—The record of the transfer of a mining claim is admissible in evidence to show compliance with the miners' rule requiring such record, but not to prove the fact of the transfer. *Attwood v. Fricot*, 2, 305
3. *Defined.*—What constitutes the record at common law, stated. *White v. Toncray*, 2, 463
4. *Object and effect of record of mining claims stated.* *Jupiter Co. v. Bodie Co.*, 4, 418
5. *Forfeiture by failure to record.*—The right to a mining claim will not be forfeited by a failure to record the same, in the absence of a miners' rule or regulation providing for a forfeiture on that ground. *Id.*
6. *Changing names of locators on the record.*—Where one of the locator's names had been erased from the recorded notice (location certificate), and the name of another party substituted: *Held*, that notwithstanding such change the record was valid as to outsiders. *Gleeson v. Martin White Co.*, 9, 429
7. *Record or office copy of deed or power of attorney.*—A deed or power of attorney can not be proved by the record thereof, or by a copy taken from the record, except in the manner prescribed by section 19 of the chapter relating to conveyances. *Sullivan v. Hense*, 9, 487
8. *The preliminary affidavit mentioned in that section* should be made by all of the persons, plaintiffs or defendants, by whom the record of an instrument, or the copy thereof, is offered in evidence. *Id.*
9. *Record or office copy of certificate of location.*—A certificate of location of a mining claim may be proved by the record or by a tran-

RECORD.—*Continued.*

script from the record under another statute without the affidavit of the party desiring to use it as to the possession of the original certificate. *Id.*

10. *Effect of changing courses on the record.* *Gleeson v. Martin White Co.*, 9, 480

11. *Sufficiency of record.*—A location notice of record calling for corner monuments, and described as bounded by four other claims, held, a sufficient description. *Southern M. Co. v. Europa M. Co.*, 9, 513

12. *Failure to record within statutory period* does not invalidate the claim when the record has been completed before another title has been perfected to the same ground. *Faxon v. Barnard*, 9, 515

13. *Idem—Facts of the case stated.* *Id.*

14. *Certified copies of instruments recorded* are admissible in evidence without proof of the execution of the originals. *Kramer v. Settle*, 9, 561

15. *Local statute as to proof of right to record.*—When a location notice is filed in the names of several persons as co-locators, it will be presumed that the recorder had not filed it without the statutory proof required by section 5 of the Idaho Mining Act. *Id.*

16. *Evidence dehors the record.*—The court can not review matters not presented in the record of the cause. *Conner v. McPhee*, 9, 570

17. *A secret equity* (as against third parties) can not be maintained. *Strout v. Natoma Co.*, 10, 330

18. *Idem—Unrecorded assignment of stock.*—The books of the corporation must constitute the test of the rights of third parties. *Id.*

19. *Omission in record—How supplied.*—Under the California practice, a deed referred to in the statement filed on motion for new trial, but not embodied therein, may be annexed thereto by appellants, accompanied with a certificate of the judge who tried the case that it is the deed mentioned in the statement and in his judgment denying the motion, and may thereafter be printed as part of the transcript of the record. *Hess v. Winder*, 12, 218

20. *Act of May 10, 1872, as affecting proof of record and of possession.* *Campbell v. Rankin*, 12, 257

21. *Record excluded where not required by law.* *Moxon v. Wilkinson*, 12, 602

22. *The record books of a mining district* are admissible in evidence as tending to prove affirmatively the existence of a local custom making the recording of claims obligatory. *Flaherty v. Guinn*, 12, 606; *Pralus v. Pacific Co.*, 12, 478

See LOCATION CERTIFICATE.

RELATION.

1. *Relation as applied to appropriation of water.*—The question whether a person has made a valid appropriation of water depends on the questions whether he has given proper notice of his intention to appropriate it, and whether he has prosecuted the work in that behalf with reasonable diligence. If he has done both of these, his rights on the completion of the work relate back to its commencement. *Osgood v. El Dorado Co.*, 5, 38

RELATION. *Continued.*

2. *Relation in case of mining patents.*—The doctrine of relation will not be applied so as to cut off the rights of the earlier patentee under a later location. *Eureka Co. v. Richmond Co.*, 9, 578

3. *Receiver's receipt as evidence—Town site title against mining location.*—In an action of trespass brought by the plaintiff as claimant of a certain town lot, against the defendant, using the same premises as a dump and as a part of his location of a ledge, where the plaintiff had, after the trespass, obtained a receiver's receipt from the land office for the price of certain land pre-empted, including the premises: *Held*, that such receiver's receipt related back to the time of filing the declaratory statement, and should have been received as evidence, although the trespass had been committed before the issue of such receiver's receipt. *Couchaine v. Bullion Co.*, 12, 285

4. *Stamping of contract, retroactive in operation.*—A contract may be stamped after suit brought on it. *Logan v. Dils*, 14, 668

5. *Mining titles extrinsic to the record—Relation back to discovery.*—Although both lodes were at the time recorded, but under a law which only required the record to state "the general course of the lode as near as may be," the record did not necessarily show the interference; therefore the owner of the Bull of the Woods could not escape an estoppel under the rule excepting cases where the real title is equally well known to both parties; nor could the record show which was the prior or senior title, as the older record may have been founded upon a prior discovery, or *vice versa*; and while both location and record of one lode might be senior to the location and record of the other, if the date of discovery, which does not appear of record, were junior, such senior record and location would avail nothing against such senior discovery being the inception of title. *Patterson v. Hitchcock*, 5, 548

RELEASE.

1. *By one, out of several defrauded.*—When one of three parties injured by the fraud of defendant has released his claim for damages, a right of action remains to the other two, who may sue in their own names. *Woodbury v. Deloss*, 12, 144

2. *Release by landlord of right to damages does not affect right of tenant.* *Mine Hill Co. v. Lippincott*, 12, 555

RE-LOCATION.

1. *Re-location of abandoned claim by one of several co-tenants allowed.* *Strang v. Ryan*, 1, 48

2. *Re-location by drift from adjoining claim.*—A re-locator must sink the original discovery shaft ten feet deeper, or make an entirely new opening by shaft, drift, adit or tunnel; it is not enough that he has run a drift into the claim from the bottom of a shaft on an adjoining claim. *Little Gunnel Co. v. Kimber*, 1, 586

3. *Premature re-location is a nullity.* *Slavonian Co. v. Perasich*, 1, 541

4. *Re-location before forfeiture.*—The re-location of a mining claim before the same is forfeited by failure to do the annual labor is void, and a subsequent failure to do the annual labor by the original locat-

RE-LOCATION. *Continued.*

ors, will not revive the void location. *Belk v. Meagher*, 1, 522; *S. C.*, 1, 510

5. *A re-location by third parties* made peaceably, after the time for annual labor had expired, is paramount to a re-location made before such period had elapsed, as well as against the original title. *Belk v. Meagher*, 1, 510

6. *Re-entry of original owner before the re-locator perfects his re-location.* *Gonu v. Russell*, 12, 630

7. *Abandonment—Second location within lines of first.* *Weill v. Lucerne Co.*, 3, 372

8. *Conveyance.*—There is no law to prevent a party from re-locating his own claim by a different name, and, though he can not thus acquire any more ground, a conveyance by the latter name will be valid. *Phillpotts v. Blasdel*, 4, 343

9. *Re-location while in possession of others—Instruction construed.*—An instruction of the court below directed the jury to find for the defendant if they believed that the E. M. Co. located the claims "at a time when they were open and subject to appropriation under the local usage of the district." *Held*, that this instruction did not imply that a re-location based upon a failure to perform work under such local rules, could be made while a party was in actual possession of the claim. *Per SPRAGUE, J., dissenting.* *Bradley v. Lee*, 4, 470

10. *Re-locating claim the title of which is doubtful.*—The acquiring of mining ground by location is procuring such right by purchase; and one in possession of mining property under a title determined in court to be invalid can not be charged with fraud because he re-located the same before such determination; he stands in no different condition than one who buys an outstanding title. *Meyendorf v. Frohner*, 5, 359

11. *Possessory Act of 1852—Amended location not retroactive.* *Hawchurst v. Lander*, 12, 214

12. *Relation.*—The statute authorizes a change of boundaries in certain cases and a re-location of the claim by the owners; it also makes provision for correcting errors in the original location certificate and when such amendment is made before adverse rights intervene the amendment relates back to the original location. *McGinnis v. Egbert*, 15, 329

13. *Proof of re-location by strangers* must be preceded by proof of abandonment by the original locators. *Id.*

14. *Entry to re-locate no trespass.* *Du Prat v. James*, 15, 341

15. *Surveying in and recording over ground no re-location.* *Omar v. Soper*, 15, 497

16. *The re-location of an abandoned mining claim* is made in substantially the same manner as the original location thereof. *Armstrong v. Lower*, 15, 631

17. *Re-location by collusion after mortgage.*—The owners of a mining claim who have mortgaged the same, may not abandon the same so as to permit the lands to be located as unoccupied mineral lands and defeat the mortgage lien thereby. *Alexander v. Sherman*, 15, 638

RE-LOCATION. *Continued.*

18. *No re-location before abandonment.* *Lockart v. Rollins,*
16, 16

19. *If an agent re-locate and benefit accrues from such act, the benefit accrues to the owner, and not to the re-locator.* *Id.*

RENTS AND ROYALTIES.

1. *Royalty on coal sold at pit's mouth—Plain covenant not left to parol testimony.* *Clifton v. Walmesley,* 8, 328

2. *Alternative rent covenants—Double recovery not allowed.* *Foley v. Addenbrooke,* 8, 349

3. *Damages—Application of payments.*—Money paid as rent and received as such under agreement, can not be applied on an account for damages though arising out of the same subject-matter. *Emery v. Owings,* 8, 379

4. *Election of mode of payment of rent determined.*—The lessees of a mine covenanted to pay forty cents a load for the ore taken, but were at liberty to substitute an annual sum at their election, to be made at the end of the first year; but in case they did not so elect, they covenanted to take out annually, and pay for, 800 loads. No substitution was in fact made at the end of the year. *Held,* that their covenant to pay at the said rate for each load became positive, absolute and indefeasible. *Fisher v. Milliken,* 8, 395

5. *Ore settlements not conclusive,* when shown to be erroneous or made in ignorance, and such error may be shown in an action on the covenants of the lease, and need not first be reformed in equity. *Perry v. Atwood,* 8, 441

6. *Settlements, no discharge of a breach in not taking out the stipulated quantity.* *Powell v. Burroughs,* 8, 531

7. *Covenants distinguished.*—The covenant for rent for coal mined is distinct from the covenant to mine a certain quantity. *Id.*

8. *Relation of covenant for sleeping rent to the covenant to work the mine considered,* upon the view that so long as this rent is paid the covenant to work is inoperative, such rent being the alternative to a covenant for royalty and a payment to the lessor while he keeps his coal. *Wheatley v. Westminster Brymbo Co.,* 8, 554

9. *Specific consideration, distinguished from rent.* *Ardesco Oil Co. v. North American Co.,* 8, 589

10. *Sub-lessee held as principal debtor.*—By the obligation of the sub-lessee to pay his lessor's debts, he became the principal debtor, and his lessor the surety, and was bound on demand to exonerate his lessor, although the original creditor may not have demanded payment. *Id.*

11. *Demand of rent in unlawful detainer.*—If the landlord bring unlawful detainer he can sustain the action (if at all) only after strict proof of demand of rent as at common law, and proof of a re-entry, or its equivalent, before commencement of his action. *Bowyer v. Seymour,* 9, 67

12. *Assignee.*—An assignee is jointly liable for rent with the lessee. *McDowell v. Hendrix,* 9, 96

13. *Threat to foreclose on previous mortgage is clearly no defense in action for rent against lessee.* *Id.*

RENTS AND ROYALTIES. *Continued.*

14. *Judgment for rent of coal lands—Title to coal.*—The recovery of a judgment for rent under a coal lease does not vest the title to the coal not mined in the lessee, no matter whether the judgment is collected or not. *Austin v. Huntsville Coal Co.*, 9, 115
15. *Royalty upon ore which mine will produce.* *Kraber's Appeal*, 9, 127
16. *Royalties, no payment on rent.*—The offer to prove full payment of the royalties on all coal mined and the exhaustion of the mine: *Held*, irrelevant in a suit for minimum rent, unless such royalties exceeded the minimum rent. *Watson Coal Co. v. Casteel*, 9, 130
17. *A covenant to mine without delay* which is broken by a fraudulent delay, is matter of equity. *Green v. Sparrow*, 12, 635
18. *Fraud—To reduce conditional rent.*—Where the lessee of a colliery, under covenant to pay a rent commencing the first quarter day after he had digged 1,000 stacks of coal, and to dig such coal without delay, etc., commenced work and dug that amount "wanting only a small quantity," and then employed his workmen in other works until the approaching quarter day had elapsed, with the expressed intent of saving the rent of one quarter. *Held*, that such fraudulent contrivance should not defeat the running of the rent from the first quarter day thus elapsed. *Id.*
19. *Construction of lease on royalties payable quarterly.* *Bishop v. Goodwin*, 12, 637
20. *Lease—"Consideration money" treated as rent.*—In a mining lease, besides an annual surface rent, certain sums payable half yearly, described as "further consideration money," and depending upon the rate of working the mines, were reserved to the lessor, his heirs and assigns. *Held*, on the death of the lessor intestate, that these sums were not purchase money passing to the personal representative of the lessor, but in the nature of rent, and therefore passed to the heir as incident to the reversion. *Barrs v. Lea*, 12, 646
21. *Royalty must be in marketable condition—Duty of tenant to provide a coal breaker.* *Audenried v. Woodward*, 12, 641
22. *Instalment payment of minerals treated as rent.* *Brook v. Bradley*, 12, 649
23. *Use and occupation of placer claim—Implied promise to pay rental.* *Dickson v. Moffat*, 12, 666
24. *Rent and yearly value not synonymous.* *Cross v. McClenahan*, 12, 669
25. *Receipts affecting terms of contract.*—Under a lease providing for the winning of a minimum number of tons per annum under certain conditions, lessee for several years paid royalty to the amount of such minimum, but in excess of the ore actually won, taking receipts that such excess should be credited on future settlements. Such receipts on suit for ore taken in later years, were admissible as credits and were not to be excluded on pretense that they were explained to lessor "as simple receipts" without any intimation "that they changed the lease." *Gorman v. Potts*, 13, 108
26. *Construction of agreement to admit a future fact.*—A provision

RENTS AND ROYALTIES. *Continued.*

in an ore lease, that if the lessees did not quit possession and surrender the leasehold on or before July 1, 1884, "the very act of their refusing or neglecting to quit possession and surrender this lease is hereby agreed on their part that there is a sufficient quantity of ore on said property to pay the royalty of \$1,200, on February 1, 1885," etc., is not to be held conclusive upon the lessees. *McCahan v. Wharton*, 16, 239

27. *Lessee not estopped by admission, but compelled to assume burden of proof.* *Id.*

28. *Rental value.*—In ejectment for the surface of land used in working a mine, evidence of the value of improvements made by defendant on the land in controversy is relevant as affecting its rental value. *Williams v. Gibson*, 16, 244

REPLEVIN.

1. *A writ of replevin is effectual for the delivery of personal property only.* *Roberts v. Dauphin Bank*, 6, 54

2. *Replevin of slate from adverse occupant of quarry.*—Replevin does not lie by one not in the actual, exclusive possession of land, whatever title he may claim, against one who is in the actual, visible, notorious occupation and possession thereof, claiming the right, for slates taken out of the quarry on the land. *Brown v. Caldwell*, 12, 674

3. *Second replevin irregular.* *Morris v. DeWitt*, 12, 680

4. *No replevin for ore unbroken can be commenced until such mineral has been converted from real into personal property.* *Knowlton v. Culver*, 12, 682

5. *Evidence of intent in taking.*—In an action of replevin for lead ore, evidence as to the intent of the defendant in taking and appropriating the property is immaterial and inadmissible, as his liability does not depend upon the *quo animo* which characterized the taking or conversion. *Ecker v. Moore*, 12, 685

6. *Title to land can not be tried, but may incidentally arise and be heard in a transitory action.* *Green v. Ashland Co.*, 12, 692

7. *The mere assertion of title is nothing if the title be not in fact in controversy.* *Id.*

8. *Ore, to which soil adheres, may be replevied.* *Id.*

9. *Party having right of possession may maintain replevin.* *Wilkinson v. Stewart*, 13, 1

10. *Replevin of mixed petroleum.*—It is no bar to an action of replevin for crude petroleum that plaintiff's oil has been mixed with other like oil of defendants by the wrongful act of a third party, where the quality of the petroleum remains unchanged. What the effect upon the plaintiff's right would be if the character of the oil were essentially changed, not decided. *Id.*

11. *Replevin lies for stone taken from bed of stream.* *Brazon v. Bressler*, 13, 163

RES ADJUDICATA.

1. *Effect of verdict.*—If, in action of trespass, the jury find generally for the plaintiffs, it concludes the parties upon all questions mate-

RES ADJUDICATA. *Continued.*

rial to the recovery of the plaintiffs, which are distinctly put in issue. *McLaughlin v. Kelly*, 7, 446

2. *Former judgment against landlord no bar in Pennsylvania.*—Proceedings were commenced before two justices by a landlord, and the inquest found for the tenant. Upon a second proceeding brought by the landlord, carried into court upon the tenant's affidavit of title acquired. *Held*, that evidence of the former proceeding was not admissible. *Neumoyer v. Andreas*, 9, 292

3. *The ruling of the Supreme Court in a particular case* becomes the law of that case, upon further proceedings, even upon points not essential to the decision. *Table Mountain Co. v. Stranahan*, 9, 465; *Lee v. Stahl*, 10, 153

4. *Application of the rule.*—The Supreme Court, upon the former appeal, having passed upon the extent of ground to which a location was limited, and the language of the court having been embodied in an instruction asked on the second trial, it was error to refuse it, as the law of the case. *Id.*

5. *Former judgment for same cause, a bar.*—A judgment in a former action is well pleaded in bar of a suit for the same cause of action although the form of action has been changed. *Taylor v. Castle*, 11, 484

6. *Idem—Test of what is res adjudicata.*—The cause of action is said to be the same where the same evidence would support either action. *Id.*

7. *Judgment on issues in bar and in abatement.* 420 M. Co. v. *Bullion Co.*, 11, 608

8. *Parol evidence as to issues decided on first trial.*—A judgment is conclusive of every issue decided in the suit, and in a second suit between the same parties, it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so. *Campbell v. Rankin*, 12, 257; *Coleman's App.*, 14, 221

9. *Mesne profits—Estoppel of judgment in ejectment.*—The verdict and judgment in the ejectment are conclusive of the plaintiff's right to recover the mesne profits only from the time the action of ejectment commenced down to the execution of the *habere facias*, and where they claimed mesne profits prior to the time of bringing their suit in ejectment, they opened the question of their title and of the possession of defendants for such prior time, and neither the judgment in ejectment nor any of the proceedings therein estopped the defendants from having their rights again passed upon, or the same evidence again submitted to a jury. *Kille v. Ege*, 12, 654

10. *No further damages from original act after one satisfaction.* *Nicklin v. Williams*, 13, 650

11. *The plea of judgment recovered is mixed of matter of record with matter of fact.* *Coleman's App.*, 14, 221

12. *Extent of ground held under judgment, shown in parol.*—The verdict and judgment did not establish title to the whole surface. It is always competent to establish by parol evidence, where it does not contradict the record, what the extent of the claim was upon which there has been a recovery. *Bronson v. Lane*, 14, 349

RESCISSION.

1. *Mortgage—Time—Non-user.* *Youngman v. Linn*, 2, 448
2. *Practice—Decree for rescission.*—In an action in equity for the rescission of a contract for the sale of land on the ground of fraud, and also to have a mortgage and notes for purchase money released and canceled, a judgment which does not provide for an absolute rescission of the contract, but treats it as valid in part, and void in part, and cancels such notes and mortgage, permitting the purchaser to retain the land, can not be sustained. *Grant v. Law*, 3, 80
3. *A contract will not be rescinded because it has become more burdensome* in its operation upon one of the parties than was anticipated. *Rutland Co. v. Ripley*, 3, 291
4. *Rescission not allowed, when—Quality.*—Where, under contract for coal of a certain quality, coal of an inferior quality has upon some of the deliveries been received and disposed of before its inferior quality was discovered, the buyer is in no position to rescind, but must rely upon his right of set-off or upon a separate action for damages. *Scott v. Kittanning Co.*, 3, 159
5. *No partial rescission—Fraud.*—A party can not disaffirm a contract in part on the ground of fraud, and affirm it as to the residue. He must make his election either to rescind *in toto* by restoring all that he has obtained by it, in which case he may recover back what he has paid on it, or he may retain the property and sue for damages for the fraud. The rule is the same in respect to both personal and real estate. *Grant v. Law*, 3, 81
6. *Return of title papers.*—It is not essential that papers, which have come to the hands of plaintiffs but were not accepted as passing any title, should be returned before bringing suit. They should be filed with the clerk for the use of parties in interest. *Reddington v. Henry*, 3, 82
7. *Facts allowing rescission after great lapse of time.* *Warner v. Daniels*, 6, 436
8. *Practice on rescission where re-conveyance is impracticable.* *Id.*
9. *Rescission is essential before defense available.* *Gifford v. Carvill*, 6, 558
10. *No tender necessary if stock absolutely without value.* *Id.*
11. *Plea of fraud and rescission.*—Defendant in suit on note given for stock sold on fraudulent representations should aver rescission, or else aver that the property received by him had absolutely no value. *Id.*
12. *Suit based on rescission.*—Where the suit presupposes rescission of the contract, plaintiff must show that the contract on which the money was paid has ceased to exist. *Byard v. Holmes*, 6, 599
13. *Partial rescission not allowed—Laches.* *Id.*
14. *Condition precedent.*—The rescission must be complete before action brought. *Id.*
15. *Re-conveyance—When not necessary.* *McCabe v. Burns*, 6, 665
16. *Receipt need not be returned.* *Id.*
17. *No recovery of purchase price with rescission.*—There can be no action by the defrauded against the guilty party for the direct recovery

RESCISSION. *Continued.*

of the entire consideration paid, until after complete and prompt rescission; and though rescission be impossible (unless prevented by the guilty party) the rule remains the same. *Getty v. Devlin*, 7, 29

18. *Statu quo*.—A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this can not be done it will give such relief only where the clearest and strongest equity imperatively demands it. *Grymes v. Sanders*, 10, 445

19. *Offer to return deed—Issues unchanged by amendment*.—An averment in such complaint of an offer to return the deed, is not an averment of a rescission of the contract, nor an offer to rescind; nor does an amendment, striking out the offer to return the deed, change the issues tendered in the complaint. *Akrens v. Adler*, 12, 114

20. *Effect of offer to return deed*.—An offer to return a deed does not re-invest the grantor with the title, nor is it a rescission of the contract by the grantee, nor an offer to rescind. *Id.*

21. *No delay allowed to rescindor*.—In suits to rescind contracts for fraud, particularly where the subject is of variable value, it is the duty of the plaintiff to put forward his complaint at the earliest period. *Jennings v. Broughton*, 12, 405

22. *Discretion to cancel instrument*.—To decree an instrument to be delivered up to be canceled is a matter in the sound discretion of the court, and the power should not be exercised except in a very clear case. *Stewart's Appeal*, 11, 491

23. *Rescission after report of expert—Saltpetre cave—Statement of material facts defined*. *Perkins v. Rice*, 13, 8

24. *Rescission after sale of stock*.—A plaintiff seeking to set aside as fraudulent a sale of mining shares made to him by the defendant, can not have a rescission after he has sold such shares; but the sale of certain shares does not deprive him of the right of rescission as to others not sold, where the property is all of one sort. *Maturin v. Tredinnick*, 13, 15

25. *Departure from prospectus by purchasing other mine—Rightful caution distinguished from laches*. *Reese River M. Co. in re.*, 13, 19

26. *Rescission of contract for mining stock—Offer to return stock before suit*.—A party seeking to rescind a contract for mining stock on the ground of fraud, is not bound to take the certificate of stock from the bank with which it has been deposited for him, and tender it back to the vendor before bringing suit. *Pence v. Langdon*, 13, 33

27. *Instructions on rescission issue*. *Id.*

28. *Delay in offering to rescind*.—A party having sold certain lands for shares of mining stock, and afterward attempting to rescind on the ground of fraud in the representations concerning the value of the stock, should offer to rescind promptly upon discovering the facts; but a delay of a little less than six months in making the offer is not such laches as to deprive the party of his right to relief. *Marston v. Simpson*, 13, 36

29. *Rescission after entry*.—A vendee, by his entry and acting as a partner in an iron concern, does not waive the benefit of a contract for good title, and may rescind upon failure to receive such title. *Stevens v. Guppy*, 13, 315

RESCISSION. *Continued.*

80. *Rescission of contract for mining lease on account of lessor's delay.* *Macbryde v. Weeks*, 13, 346
81. *Restoration before rescission—Tender not needed where offset exists.* *Watts v. White*, 13, 11
82. *Mere inadequacy of price is not sufficient to set aside a deed.* *Harris v. Tyson*, 14, 684
83. *Refusal by vendee to pay.*—When the payment of the purchase money is a condition precedent to the delivery of the deed, the refusal to pay the whole or any balance due leaves the vendor at liberty to rescind. *Hamill v. Thompson*, 14, 696
84. *Discretion in decreeing rescission.*—Whether the rescission of a contract will be decreed rests in the sound discretion of the court, exercised with reference to all the equities of the case. *Id.*

RESERVATION.

1. *Loose rock reserved.*—When the words of grant carry only rock in place the exception of the loose rock is simply inoperative. *Dexter Lime Co. v. Dexter*, 4, 291
2. *Reservation of "all the free stones" confined to stone on surface.* *Putnam v. Smith*, 13, 68
3. *Reservation of coal in deed.*—Where a deed in fee of land was made, the grantor "saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free ingress and egress by wagon road to haul the coal therefrom as wanted," it was held, that the saving clause operated as an exception of the coal, and therefore, that the entire and perpetual property therein remained in the grantor. *Whittaker v. Brown*, 5, 656
4. *Reservation may operate as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or reserved.* But it will not give title to a stranger. *West Point Co. v. Reymert*, 7, 528
5. *Reservation of minerals in inclosure act.* *Pretty v. Solly*, 8, 801
6. *Reservation equivalent to grant.*—A reserve of minerals is construed as an actual grant thereof. *Marvin v. Brewster Co.*, 13, 40
7. *Right of mine owner to penetrate surface.*—The reservation in a deed of land of the minerals which may be found therein, implies the right to penetrate the surface for minerals, and to use such means in mining and removing the minerals as are necessary to a profitable working of the property; but the means used must be necessary, as distinguished from convenient. *Id.*
8. *The miner in his surface user may keep pace with the progress of invention* so far as is necessary in competition with rivals. *Id.*
9. *Subsequent deeds ignoring reservation.*—The fact that deeds to subsequent grantees of the surface do not contain the reservations of the right to minerals contained in prior grants, does not affect the right of the mine owner to the minerals, or the mode of procuring them. *Id.*
10. *Reservation unaffected by non-user—Purchaser compensated against ancient exception of minerals.* *Seaman v. Vawdrey*, 13, 63
11. *Extent of reservation—Exception out of exception.*—Vendor con-

RESERVATION. *Continued.*

veyed certain closes with buildings thereon *excepting* all mines and coal, with liberty to himself to enter and sink pits for getting all such coal, and to erect engines, etc., *excepting* as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead. *Held*, that the exception reserved to the vendor the right to dig coal under the messuage, buildings and homestead, and within 150 yards of the same, respectively, but that he was not entitled to sink pits, erect engines, etc., within 150 yards of the messuage or buildings or within the homestead. *Bowler v. Wolley*, 13, 65

12. *Reservation of "mineral magnesia of any kind."*—*Held*, such a reservation as entitled the grantor to chromate of iron afterward found. *Gibson v. Tyson*, 13, 72

18. *Reservation of moiety of ore where the other moiety was outstanding in another.*—B., seized in fee of a tract of land, subject to an outstanding title to one-half of all iron ore found on the premises, conveyed the same to H. in fee, "excepting and reserving to the said B., his heirs and assigns, the one-half of all iron ore found on the premises." *Held*, to be a reservation to the grantor himself of that half of the ore which was vested in him, and not a mere notice of the reservation of the other half which was outstanding. *Baker v. McDowell*, 13, 84

14. *Reservation large as the grant, is void.* *Shoenberger v. Lyon*, 13, 88

15. *Application of rule to the facts.* *Id.*

16. *Form of reservation of ores set forth at length in statement of the case.* *Id.*

17. *General reservation—Life estate.*—A reservation to the grantor generally, without words of enlargement or limitation, is a reservation for the period of the grantor's natural life. *Munn v. Stone*, 13, 102

18. *Construction.*—A condition, upon the performance of which a reservation depends, must be strictly performed by the grantor, and within the time limited. *House v. Palmer*, 13, 104

19. *Reservation of right to test for gold.*—The vendor of land retaining the right to test it for gold within eighteen months, with the right to work it if found, must not only make the test within the time limited, but must also give notice to the grantee of his election to preserve the reservation. *Id.*

20. *Construction of deed reserving "all" ore to third party owning but four-fifths.* *Benson v. Miner's Bank*, 13, 107

21. *The right to minerals reserved carries with it the right to enter, and all incidents necessary to getting them.* *Cowan v. Hardeman*, 13, 113

22. *Reservation distinguished from exception.* *Stockbridge Co. v. Hudson Co.*, 13, 120

23. *Idem—Incidents of reservation—Grantee not excluded—Statute of Frauds.*—Such reservation saves to the grantor no title to the land, or to the ore before it is mined or separated from the land; it does not restrict the grantee from mining at the same time, even to the exhaustion of the ore, and is not within the Statute of Frauds. *Id.*

24. *Reservation of ore for supply of one furnace not limited to capacity of furnace then in use.* *Alden's Appeal*, 13, 139

RESERVATION. *Continued.*

25. *Idem*—The measure of the quantity of the ore was so much ore and no more, as a given furnace would use in the course of a year, taking into consideration the wear and tear, and the necessity of its going out of blast for repairs at stated intervals. *Id.*

26. *Reservation limited by annual periods.*—If not availed of during that time and the qualification is inoperative, it is forfeit. *Id.*

27. *A reservation relates back, the same as the granting clauses of the patent.* *Pacific Co. v. Spargo,* 16, 75

28. *Parol proof of reserving possession after deed delivered.*—Under Gen. St. Colo., C. 18, Sec. 9, providing that in the absence of an inconsistent provision in a deed it will carry the right to immediate possession of the land therein conveyed, parol evidence of an agreement that possession should not pass until the purchase money was fully paid is inadmissible. *Omaha Co. v. Tabor,* 16, 184

29. *The reservation of the right to quarry or mine is assignable.* *Munn v. Stone,* 13, 102; *Stockbridge Co. v. Hudson Co.,* 13, 120

RIPARIAN RIGHTS.

1. *Riparian rights of furnace and mill owners.* *Pool v. Lewis,* 5, 523

2. *Nominal injury to riparian rights* is caused by divergence of a natural stream from a piece of land, even if there be no actual damage. *Creighton v. Evans,* 8, 128

3. *Rights of lower proprietor.*—Each riparian proprietor has the right to have the water of a stream running in a defined channel continue so to flow, except so far as the same may be appropriated for domestic use, stock and reasonable irrigation. *Coffman v. Robbins,* 3, 181

4. *State patent on river bed.*—A warrant under the act of 1848, and a survey thereon of the bottom of the Monongahela River, passes not the title to the soil, but the right "to dig and mine for iron, coal, limestone, sand, gravel and fire clay." The warrantee does not acquire the right to the sand deposited on the bed of the river by current; the right to that remains in the commonwealth. The patent granted only the right to dig and mine under the bed of the river. *Brandt v. McKee,* 9, 216

5. *Right to use of water* by upper owner can not diminish quantity or quality reaching lower proprietor. *Wheatley v. Christman,* 11, 24

6. *Right to mining claim to bed of stream.*—The prior locator of a mining claim on the bank of a stream, has the right to the use of the bed of the stream for the purpose of working his claim; and any subsequent erection, dam or embankment, which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary appliances, is an encroachment upon the rights of such party, and entitles him to the recovery of damages. *Sims v. Smith,* 13, 161

7. *Easement for navigation gives no right to remove the soil.* *Bracon v. Bressler,* 13, 163

8. *Grants of land bounded on rivers,* or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river. *Id.*

SALE.

1. *Sale of prospector's interest—Outfit.*—Jones was one of a company organized to go to California. He owned a share and a half in the outfit. By writing, he sold to B. "one-half of his interest in the company," qualified afterward by a claim that B. should not be a partner in the company, but only purchaser of one-half of Jones' interest in the "metals and ores" to be obtained. *Held*, no conveyance of any part of Jones' interest in the outfit. *Phillips v. Jones, Adm.*, 2, 522

2. *Deduction of duties from purchase money.*—When merchandise is sold to be delivered at a particular place free of charge, the vendee may pay any government duties required to be paid before delivery, and deduct the same from the purchase money. *Fitch v. Archibald*, 2, 555

3. *Verbal sale of copper lode prior to 1863.*—Prior to the act of April 18, 1860, title to a mining claim would pass by a verbal sale if accompanied by an actual transfer of the possession. The statute applied in terms only to gold mines until, by amendment of 1863, it was extended to mines generally. A verbal sale, therefore, of a copper vein, prior to 1863, would pass title. *Patterson v. Keystone M. Co.*, 13, 171

4. *Verbal sale proved under averment of sale in writing.*—In an action to recover an interest in a lode, the defendant answered, claiming title by virtue of a sale in writing. *Held*, that the defendant was not by this allegation precluded from proving a verbal sale, the allegation being an averment of evidence not going to make a material issue. *Id.*

5. *No delivery and no price fixed, no sale.* *Bigley v. Risher*, 13, 176

6. *Sale defined.*—Sale means a contract to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought. *Id.*

7. *Parol sale of mining claim is legal, as right to claim rests on possession.* *Gatewood v. McLaughlin*, 13, 387; *Patterson v. Keystone Co.*, 13, 169

SALINES.

1. *Salines reserved by the United States—General policy of government.* *Morton v. State*, 12, 451

2. *Not waste to dig new wells.*—Tenant for life may dig a new salt well communicating with the same fountain, without restraint. *Findlay v. Smith*, 13, 182

SCHOOL LANDS.

1. *At what time title vests in the State.*—Under the act of March 3, 1853, the State of California became the absolute owner of sections sixteen and thirty-six, both as to quantity and position, as fast as they were surveyed and sectionized, and her title did not depend upon the acceptance of selections by the officers of the United States. *Higgins v. Houghton*, 13, 193

2. *Power of State to sell mineral lands.*—The State of California, as owner of sections sixteen and thirty-six, may sell and issue patents for them regardless of the fact that they contain precious metals, or may by her laws prohibit the sale of such lands. *Id.*

SCHOOL LANDS. *Continued.*

3. *Certificates of purchase of school lands* leave the land open to rights of miners. *Id.*

4. *Patents for school lands.*—Query: Does the patentee of the State, for any part of the sixteenth or thirty-sixth sections, hold the same subject to the right of miners to enter upon and work the same for mining purposes. *Id.*

5. *At the time of the passage of the Nevada enabling act* (1864), sections 16 and 36 (school sections) had not been surveyed, nor had Congress then authorized any disposition of the public domain within her limits. *Heydenfeldt v. Daney Co.*, 13, 204

6. *Title passes not till survey—Compensation.* *Id.*

7. *Mining patent on school land.*—The holder of a patent from the United States for a mining claim, located upon a school section, holds title as against the patent of the State, prior in date to the United States patent, but later than the date of the mining location. *Id.*

8. *Where a prior settler upon a school section waives his right of pre-emption*, the land vests, upon survey, in the State. *Natoma Co. v. Bugbey*, 13, 211. Qualified, *Ivanhoe Co. v. Keystone Co.*, 13, 223

9. *Idem—Rights of third parties.*—Where a settler upon school sections prior to their survey has waived his right of purchase from the United States and taken title from the State, a third party can not contest his title on the ground that the land was settled at the time of survey. *Natoma Co. v. Bugbey*, 13, 211

10. *Mineral lands excluded in grant of school lands.* *Ivanhoe M. Co. v. Keystone M. Co.*, 13, 214

11. *Strict pre-emption settlement not required.*—By the act of March 3, 1853, whenever, at the date of the survey of sections 16 and 36 of the public lands granted by said act to California for school purposes, a settlement had been made thereon by the erection of a dwelling house, or by cultivation, and a title asserted by virtue of such settlement to a portion thereof, such title is valid, although the acts done are not the same as required to secure a pre-emption right under the act of Sept. 4, 1841. *Id.*

12. *Idem—Right of selection in lieu.*—The title in such a case where the settler's right has intervened does not vest in the State, but she has the right to select other land in lieu thereof. *Id.*

SEAL.

1. *Adoption of scroll as seal of several.*—A deed purporting to be executed under the hands and seals of the grantors, is the deed of all the signers, although there be not a scroll opposite each name. *Lunsford v. La Motte Co.*, 9, 309

SET-OFF.

1. *Recoupment, when allowable between lessor and lessee.* *Williams v. Schmidt*, 2, 28

2. *Recoupment.*—Mutual demands arising out of the same subject-matter, although one arises *ex contractu* and the other *ex delicto*, capable of being balanced against each other, may be adjusted in one action. *Brigham v. Hawley*, 2, 59

3. *Offset of rent in trover.*—In trover against the lessor for taking

SET-OFF. *Continued.*

his tenant's coal, rent can not be allowed as an offset. *Lykens Valley Co. v. Dock*, 8, 571

4. *Waiver of set-off, to save forfeiture.*—A sub-lessee of premises subject to forfeiture for non-payment of royalty and other debts in arrear, in consideration of obtaining his sub-lease, covenanted to pay the royalty in arrear and accruing rent and the other debts. In suit on his covenant it was held such agreement implied a waiver of his right to plead a set-off. *Ardesco Oil Co. v. North American Co.*, 8, 589

SEVERANCE.

1. *Rights of lord of the manor.*—Though the property in the minerals be in the lord of the manor, it does not follow that he can enter and take them without consent. *Grey v. Duke of Northumberland*, 7, 251

2. *Relation between mine and surface—What the mine owner may do.* *Marvin v. Brewster Co.*, 13, 40

3. *Power of Crown to grant license to mine.*—Whether, under a mere reservation of Royal mines without a right of entry, the Crown can grant a license to enter on the land for the purpose of working them, *quære*. *Seaman v. Vaudrey*, 13, 63

4. *Construction of Texas statute reserving minerals to the Republic.* *Cowan v. Hardeman*, 13, 113

5. *Grant by co-tenant with reservation of ore, void.* *Adam v. Briggs Iron Co.*, 13, 225

6. *Presumption of severance from adverse user.*—In trover for copper ore raised under the plaintiff's land, held, that the presumption that the minerals followed the fee in the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff and their user by persons not the owners of the soil. *Rowe v. Grenfel*, 13, 234

7. *A severance of the mineral and surface estates is consistent with the nature of land and qualifies the maxim *cujus est solum ejus est ad cælum*.* *Stewart v. Chadwick*, 13, 236

8. *Extrinsic evidence as to severance.*—In the construction of a contract inferring the severance of the surface and subsoil rights, extrinsic evidence is admissible to show the use to which the land is or may be applied. *Id.*

9. *Severance of mineral held in trust.* *Id.*

10. *Power not authorizing severance.*—An absolute power of sale or exchange of "all or any part" of lands does not authorize a severance of the minerals by the trustees; *i. e.*, it does not authorize a sale with a reservation of the minerals. *Buckley v. Howell*, 13, 245

11. *Grant of right to dig coal.*—A conveyance of "the full right, title and privilege of digging and taking away coal to any extent (the grantee) may think proper * * * under the land of the" grantor, effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. *Armstrong v. Caldwell*, 13, 253

12. *No presumption of possession after severance.* *Id.*

13. *Non-user.*—In such case the owner of the minerals does not

SEVERANCE. *Continued.*

lose his right or his possession by any length of non-user. He must be disseized to lose his right, and there can be no disseizin by act that does not take the minerals out of his possession. *Id.*

14. *Surface support after severance.*—By partition, the surface was severed from the underlying coal, and the parts were allotted to different heirs, without any limitation as to the removal of coal: *Held*, that the owner of the coal could not remove it without leaving sufficient support for the surface. *Jones v. Wagner*, 13, 690

15. *The estate being severed, each must respect the other.* *Williams v. Gibson*, 16, 248

SHARE—SHAREHOLDER.

1. *Attempted restriction upon transfer of shares.*—A company's deed provided that the company should not be affected by notice of any trust, and that where any share should become vested in any person, for any interest not absolute, the receipt of the shareholder should remain a sufficient discharge. *Held*, that the equitable mortgagee of shares had a right to sue the company. *Binney v. Ince Hall Co.*, 11, 410

2. *Articles of association not signed by shareholder.*—Under articles of association providing that the ownership of a certificate should carry with it an undivided interest in all company property, the fact that a subsequent purchaser of a certificate had never subscribed the articles, is of no consequence as affecting his right to a ratable share of the proceeds of a sale of the company's property. *Butterfield v. Beardsley*, 11, 495

3. *Liability for company debts after transfer of scrip.*—The defendants had purchased the scrip of a mining company originated in fraud, and had attended the meetings of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after defendants had purchased their scrip: *Held*, they were liable. *Ellis v. Schmoeck*, 13, 259

4. *Shares of members owning the mine treated as paid up.* *Baglan Hall Colliery Co., In re*, 13, 261

5. *Paid-up shares.*—Review of the English decisions as to what shares are paid up. *Id.*

6. *The test to determine whether paid-up shares (so called) are in fact such, is, could the company have set aside the transaction by which it has so treated them?* *Id.*

7. *Fraudulent issue of shares as fully paid up—Liability of shareholders.* *Foreman v. Bigelow*, 13, 269

See STOCKHOLDERS.

SHERIFF'S SALE.

1. *Recital of judgment in sheriff's or constable's deed* is essential to its validity. *Wiseman v. McNulty*, 6, 326

2. *It is the policy of the law to favor purchasers at sheriff's sales, as against debtors in the execution whose debts have been paid by the purchasers, but not as against third persons.* *Irwin v. Harris*, 14, 584

SIDE LINES.

1. *Side lines*.—A vein can not be followed beyond the adopted side lines. *Golden Fleece Co. v. Cable Co.*, 1, 120

2. *Lateral boundaries limit right of possession*.—A lode claim is to be fixed by reference to the plat or survey of the location, and although the lode in its descending course may be followed to any depth into the premises adjoining, yet in its onward course or strike, it may not depart from the line of its location, and the patentee is not entitled to its possession beyond the lateral boundaries, as against one who has subsequently located and patented it. If the patent is broader than the law, it is to that extent nugatory. *Wolfley v. Lebanon Co.*, 13, 232

See APEX—DIP.

SIDE VEINS.

1. *The object of location statutes* is not merely to fix the amount of surface territory allowed the locator for working purposes, but also to protect him in the exclusive possession and enjoyment of his lode, and all other veins, lodes or ledges, the apexes of which are within his surface boundaries. *Armstrong v. Lower*, 15, 632

See LODE.

SPECIFIC PERFORMANCE.

1. *Parol waiver*.—A written contract to sell and convey certain premises may in equity be waived by parol, but such parol waiver must be clear and explicit, and the refusal of one of the parties to accept of a conveyance, unless the premises were described according to his understanding of the contract, is not such a waiver, and he may insist upon a specific performance of the contract. *Huffman v. Hummer*, 2, 242

2. *Laches—Law and equity*.—A party who has a contract for certain premises, the price to be paid on the execution of the conveyance, is not bound at law to pay or to offer to pay until the deed is properly executed; equity requires one seeking a specific performance to show himself ready to perform, but the refusal of the other party to convey, dispenses with any further tender of money or readiness to perform. *Id.*

3. *Continuous contract—Mutuality—Remedy at law*.—A decree for specific performance is not a matter of right, but rests in the sound discretion of the court, and generally will not be made in favor of a party who has himself been in default. Another objection to such decree may be found in the peculiar character of the contract, *e. g.*, the contract being for a perpetual supply of marble. If performance be decreed the cause must remain in court forever, and the court can not superintend the execution of such a decree. Again, there is a want of mutuality; the decree could not be enforced against one of the parties because the contract stipulates that he may abandon it upon one year's notice, and, finally, the right of re-entry reserved in the contract gives a complete legal remedy so that specific performance will not be decreed. *Rutland Marble Co. v. Ripley*, 3, 291

4. *Contract of purchase* must be complied with specifically, or there

SPECIFIC PERFORMANCE. *Continued.*

may be suit in equity by injured party. *Belle Greene M. Co. v. Tugle*, 5, 464

5. *Vendor keeping possession after contract made.*—Where the B. G. M. Co. agreed to purchase land and take title thereto at a future date, and thereupon entered on parcel of the tract, but failed to comply with the agreement to purchase, the right of the vendor to specific performance was not lost by the fact that he remained in possession after such failure, he holding himself in readiness to make conveyance upon compliance with the contract by the B. G. M. Co. *Id.*

6. *Specific performance as to mode of working.*—The matter of a lease, covenanting for the working of a series of underlying beds of coal, held, (obiter) not a matter for specific performance. *Abinger v. Ashton*, 6, 1

7. *Facts of the case—Covenants as to working three successive underlying coal seams.* *Id.*

8. *Sudden appreciation after election made.*—Increase of value is not such a change in the subject-matter of a contract as is, of itself, a ground for rescission or to excuse non-enforcement; but if one of the parties refuse to perform, and then comes a change of circumstances upon the strength of which he is desirous to go on with the bargain, he may be properly repelled, although he was watching for that change. *Falls v. Carpenter*, 6, 398

9. *Ignorance of lessee—Subsequent failure of mine.*—A person contracting for the lease of a mine can not resist a specific performance on the ground of his ignorance of mining matters and of the mine turning out worthless. *Haywood v. Cope*, 6, 499

10. *Discretion defined—Inadequate consideration, no defense to specific performance.* *Id.*

11. *Taking possession of the mine by intended lessee held not to be an acceptance of the title.* *Id.*

12. *Assignee of purchase money a proper party.*—On bill for specific performance, an assignee of parcel of the purchase money has an equitable interest, may be affected by the decree, and is a proper party defendant. *Davis v. Henry*, 6, 680

13. *Vendor unable to pass minerals.*—Specific performance of contract for sale of land not decreed where the vendor can not make title to the minerals. *Pretty v. Solly*, 8, 801

14. *Specific performance, when not discretionary.*—When a contract for the sale of land is in writing, fair in all its parts, certain and for an adequate consideration, its specific performance becomes a matter of course; it ceases to be discretionary. *North Georgia Co. v. Latimer*, 12, 367

15. *In specific performance the vendee may elect to take compensation for an outstanding reservation, instead of using it as a defense.* *Seaman v. Vawdrey*, 13, 62

16. *The discovery of a valuable mine between the time of contract and the time for delivery of deed does not give ground for refusing specific performance.* *Beam v. Valle*, 13, 292

17. *Covenant to restore gravel pits.*—A court of equity will not

SPECIFIC PERFORMANCE. *Continued.*

decree specific performance of a covenant by the lessor to fill up gravel pits upon the premises intended in the demise, the legal remedy for breach of the covenant being ample. *Flint v. Brandon*, 13, 308

18. *The principle upon which specific performance is decreed is that the legal remedy is inadequate or defective. Id.*

19. *Delay—Inadequate consideration and concealment of knowledge of salt springs—A defense to special performance. Bowman v. Irons*, 13, 312

20. *Defective title excuses vendee of land. Stevens v. Guppy*, 13, 315

21. *Agreement to work in a particular manner.*—The remedy in an ordinary case of an agreement to work a quarry in a particular manner is at law; specific performance refused. *Booth v. Pollard*, 13, 323

22. *Specific performance, when decreed.*—Specific performance of a contract is not a matter of right in the parties, but depends upon the sound and reasonable discretion of the court; is granted or withheld according to the circumstances of the case; and the court must be satisfied that the contract sought to be enforced is, fair, just and reasonable, equal in all its parts, and founded on an adequate consideration. *Geiger v. Green*, 13, 334

23. *Specific performance of a privilege to mine, not enforced. Id.*

24. *Contract too indefinite—Decree for lease of moiety of a colliery. Price v. Griffith*, 13, 330

25. *Laches in enforcing coal contract—Construction. Pollard v. Clayton*, 13, 334

26. *Supervision of working by court—Special value of particular coal mine to particular iron works.*—Leave to amend and to account for the laches, refused, on the ground that a court of equity could not interfere to see to the execution of a contract of that character, due in installments and requiring peculiar supervision, and the benefit to be derived from the particular location of the beds relative to the iron works, not being, of itself, sufficient ground for specific performance. *Id.*

27. *Vendor must furnish abstract of title. Macbryde v. Weeks*, 13, 346

28. *Denied to parties seeking benefit of discovery made by others. Cabe v. Dixon*, 13, 357

29. *Specific performance of contract for stock.*—The general rule that a court of equity would not enforce a specific performance of an agreement for the transfer of stock, applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law. *Treasurer v. Commercial M. Co.*, 13, 360

30. *Idem—Where the stock has no certain value.*—Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance. *Id.*

31. *Exception to general rule in case of mining stocks.*—In this State courts of equity will decree a specific performance of contracts for the

SPECIFIC PERFORMANCE. *Continued.*

transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating by competent evidence what would be a proper measure of damages. *Id.*

82. *Prospector locating greater claim than he allows to his outfitters, held to specific performance.* *Welland v. Huber*, 13, 363

83. *Conveyance out of and admission by plaintiffs.*—Plaintiffs had sold their interest in the specific feet located in their names to defendant, their associate, and had admitted that they had sold out their interest in the mine: *Held*, (but specifically upon the pleadings) that these facts were no bar to the decree prayed for. *Id.*

84. *Defense to be confined to issue raised by pleadings.* *Id.*

85. *Specific performance where subject-matter (coal) proves non-existent.* *Jefferys v. Fairs*, 13, 367

86. *Misrepresentation defeats specific performance.* *Fisher v. Worral*, 14, 624

87. *The same as to secret mining before purchase.* *Phillips v. Homfray*, 14, 677

88. *Lessee in contention ordered to pay royalties into court.* *Lewis v. James*, 15, 649

SPRINGS.

1. *Where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring.* *Wheatley v. Baugh*, 13, 374

2. *But where the spring depends for its supply upon percolations through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence.* *Id.*

3. *No servitude in favor of percolating waters.*—The prior use of a spring for the purposes of a tannery, confers no right of servitude over or through the land of the adjoining proprietor through whose land the water percolates. *Id.*

4. *Idem—No prescription.*—Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress. *Id.*

5. *Springs tapped by mining.*—The loss of springs to the owner of the surface by reason of the ordinary working of the mines, does not render the owner of the minerals liable for damages. *Coleman v. Chadwick*, 14, 9; *Trout v. McDonald*, 9, 32

6. *Subterraneous stream—No action against mine draining well.* *Acton v. Blundell*, 15, 168

7. *Quære, if the well had been ancient, whether there would have been any difference?* *Id.*

8. *Spring drained by quarry.*—The owner of a farm may dig a ditch to drain his land, or open and work a quarry upon it, although by

SPRINGS. *Continued.*

so doing, he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a small stream of water flowing partly through the land of each, and thereby diminishes the natural supply of water, to the injury of the adjoining proprietor. *Ellis v. Duncan*, 15, 183

9. *It is a case of damnum absque injuria. Id.*

STATUTE.

1. *Adoption of statute of other State.*—In adopting substantially the statute of another State, the legislature is presumed to have intended that such statute shall receive the same construction given it by the courts of the State from which it was adopted. *Bradbury v. Davis*, 3, 399

2. *Retroactive statute.*—A statute should be, as a rule, construed to operate only upon the future; but unless controlled by constitutional prohibition it is competent for a legislature to give to a statute a retroactive effect. *Von Schmidt v. Huntington*, 6, 284

3. *Implication completes power necessary to make a statute effectual.* *Com. v. Conyngham*, 8, 82

4. *Construction of statute* by the rule that the particular enactment controls the general enactment, and by reference to the context. *Pretty v. Solly*, 8, 301

5. *The day of the date of the passage of an act* is to be excluded from the period during which it operates. *Hunter v. Savage M. Co.*, 9, 357

6. *Repugnant statutes.*—When two statutes of different dates are repugnant, the latter repeals the former to the extent of such repugnancy. *Union Iron Co. v. Pierce*, 12, 20

7. *Repeal—Effect on pending suits.*—Actions on statutes in their nature penal, pending at the time of the repeal of such statutes, can not be further prosecuted after such repeal. *Id.*

8. *Acts concerning the same subject*, passed at the same time, should receive construction giving effect to both. *Lorimier v. Lewis*, 12, 487

9. *When the object is plain and the language unequivocal*, effect must be given to the law by the courts, but burdens are never to be imposed upon citizens upon vague or doubtful interpretations. *Stanley v. Little Pittsburg Co.*, 14, 215

10. A "*casus omissus*" in a statute can never be supplied by judicial construction. *Com. v. Wilkesbarre Coal Co.*, 15, 31

11. *Carelessness in the wording of statutes.* *Hobart v. Ford*, 15, 286

12. *Intendment in favor of legislative power.*—The question whether a particular requirement is in excess of the legislative power to establish due police regulations is one to be determined by the legislature itself, and such determination ought not to be interfered with unless the legislature manifestly transcends its powers. *Daniels v. Hilgard*, 15, 280

STATUTE OF FRAUDS.

1. *Payee of bill.*—The statute of frauds has no application in suits on an acceptance. In a suit by the payee of a bill of exchange against the acceptor, the question as to the consideration between the drawer

STATUTE OF FRAUDS. *Continued.*

and acceptor can not be inquired into. *Lafkin Co. v. Stineheimer*, 2, 167

2. *Statute of frauds, how pleaded.* *Beard v. Converse*, 2, 670
Bean v. Valle, 13, 292

3. *Ditch contract—Promise to pay the debt of another.*—E. contracted to build an extension to a ditch upon which a mortgage existed. After work commenced, the holder of the mortgage instituted a foreclosure suit, whereupon E. refused to complete the extension. The holder of the mortgage then orally promised E. that he should be paid out of the receipts for the sale of water by the receiver, E. having originally agreed to be paid out of the proceeds of sales. Under this promise, E. completed the work: *Held*, that the contract was within the statute of frauds, as a promise to pay the debt of another. *Ellison v. Jackson Water Co.*, 4, 559

4. *It is essential to the validity of contract that it, or some note or memorandum thereof, be in writing, that it express a consideration, and be subscribed by the party to be charged; and the consideration of the original contract did not attach to the promise made to a third party.* *Id.*

5. *Executed license—Estoppel.*—Y. and N. agreed, but not in writing, to construct a ditch for the conveyance of water with which to irrigate their lands and to share equally in using the water. N., whose land was above that of Y., diverted all the water of the ditch, and thereby injured Y.'s crops. In an action on the case for diverting the water, *held*, that the agreement was not within the statute of frauds, and that it was in the nature of an executed license, which N. was estopped to revoke. *Yunker v. Nichols*, 8, 64

6. *Statute of frauds not invoked to favor trespasser.* *Ganter v. Atkinson*, 9, 18

7. *The agreement was signed by the grantor, and the firm name of the grantees was signed by one of them.* *Held*, that if it were the grant of an interest in land, it was a sufficient signing within the statute of frauds, the owner having signed, which bound him. *Johnston v. Owen*, 9, 800

8. *Idem—Grantee need not sign.* *Id.*

9. *Possessory rights are not within the statute of frauds.* *Table Mountain Co. v. Stranahan*, 9, 457

10. *Sale by transfer of receiver's receipt.*—*Held*, that the contract was not within the statute of frauds and specific performance was decreed. *Bean v. Valle*, 13, 292

11. *Partnership agreement—Sub-leases.*—An agreement between A, a lessee of a mine, and B, to become partners in the mine, paying the reserved rent, sub-letting the mine at a royalty and dividing the profits: *Held*, to be within the statute of frauds, and not sufficiently proved by a receipt signed by A and given to B, for a sum as B's share of the head rent of the mine, the sum being exactly half of that rent. *Cad-dick v. Skidmore*, 13, 883

12. *Assumption of the mine debts by the lessee.*—Creditors under such assumption protected against attaching creditors. *Vincent v. Watson*, 13, 888

STATUTE OF FRAUDS. *Continued.*

13. *The creditors of the lessor might severally maintain suit against the lessees on their assumption to pay the claims of the former.* *Vincent v. Watson,* 13, 388

14. *Release of lien, good consideration for promise of assumption.*—When a creditor agrees to assume the debt due to another creditor in consideration of such second creditor releasing his lien to the advantage of the security of the first creditor, such contract is not within the statute of frauds. *Carothers v. Connolly,* 13, 394

15. *Void sale of sand.*—Contract being signed only by plaintiff, and being held, to be an agreement of sale of interest in land. *O'Donnell ads. Brehen,* 13, 397

16. *Stock contract void under statute of frauds.*—A contract to sell and deliver at a future day mining stock (price \$1,850) when no part of the stock is delivered, no part of the purchase money paid, and no note or memorandum of the sale or transaction made or signed by the parties, is void under the statute of frauds. *Mayer v. Child,* 13, 399

17. *The assignment of a contract void under the statute of frauds does not constitute a good consideration for a promise to pay.* *Id.*

18. *Parol promise by stockholder to pay corporate debt.*—Where goods are sold and credit given to a corporation, an officer and stockholder can not be held personally liable for the debts thus created, upon a promise to pay or see them paid, unless such promise be in writing. *Searight v. Payne,* 13, 401

19. *Verbal agreement to reduce to writing.*—The fact that the party receiving a conveyance of land verbally agreed at the time, with the person paying the consideration, that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust *express* as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the statute of frauds. *Baylis v. Baxter,* 14, 561

20. *The statute of frauds does not apply to a trust which is raised as a legal result from the facts.* *Id.*

21. *Mining claim is real estate.*—A verbal sale will not pass title. *Melton v. Lambard,* 14, 695

22. *Verbal agreement enforced.*—Plaintiff outfitted defendant to re-locate an abandoned mine. The re-location was made in defendant's name, with verbal agreement to transfer one-half to plaintiff in pursuance of the original understanding. *Held,* that such contract was not within the statute of frauds and was enforceable. *Moritz v. Lavelle,* 16, 236

23. *A verbal contract for the purchase of land,* having never been reduced to writing, nor accompanied by payment of any part of the purchase price, is within the statute of frauds, and confers no rights which would prejudice the parties to an ejectment suit for the land. *Williams v. Gibson,* 16, 244

STATUTE OF LIMITATIONS.

1. *Prescription.*—To acquire title by prescription, it is necessary that the period of enjoyment should equal the time fixed by the statute of limitations as a bar to an entry on land, which in California is five years. *Crandall v. Woods,* 1, 604

STATUTE OF LIMITATIONS. *Continued.*

2. *Tax title defeated by.* *Wilson v. Henry*, 1, 152
3. *Relief from fraud—Statute of limitations.*—Actions upon the ground of fraud must be instituted within three years after the discovery of the fraudulent acts relied upon as the ground of relief, or be forever barred. *Bradbury v. Davis*, 3, 398
4. *Deed—Non-user.*—The right of mining can only be acquired by deed and is not forfeited by non-user of less than twenty years. *McBee v. Loftis*, 3, 222
5. *Averments necessary in bill to avoid bar of statute.*—A statute provided that an action for relief on the ground of fraud must be brought within three years, the cause of action not being deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. *Held*, that upon suits for acts performed more than three years before, the bill must aver that the facts constituting the fraud were not discovered till within three years. *Dannmeyer v. Coleman*, 5, 475
6. *Underground and unknown trespasses do not differ from other trespasses*, in the application of the statute of limitations. *Williams v. Pomeroy Coal Co.*, 6, 195
7. *Consequential damages barred.*—The bar to a recovery in an action for a trespass, includes all the consequences resulting from such trespass. *Id.*
8. *Prescription.*—The right to divert water from its natural channel under the common law or the civil law, can be acquired by prescription only. *Arnold v. Foot*, 8, 83
9. *The statute of limitations does not run against the United States.* *Union M. Co. v. Ferris*, 8, 91; *Vansickle v. Haines*, 15, 201
10. *Burden on defendant.*—So long as a wrongful working is to be treated as inadvertent the statute of limitations applies, and an account will be restricted to six years prior to the going of the writ; but the *onus* was, in this cause, put upon the defendant to show that the minerals gotten by him during the interval in controversy were gotten before the six years. *Trotter v. Maclean*, 10, 263
11. *Date of commencement of action when new parties have been substituted.*—*Held*, that although the plaintiffs had been added without objection, yet they thereby acquired no rights relating back of their admission, and the action commenced as to them when their names were put on the record. *Kille v. Ege*, 12, 654
12. *Presumption of grant in favor of possession.* *Mather v. Trinity Church*, 14, 472
13. *Damages beyond statutory period.*—Where the damages allowable during years not barred by the statute of limitations have been assessed along with damages accruing during a period which was protected by the statute, so that the court can not segregate one from the other, the error necessitates a reversal of judgment. *Toombs v. Hornbuckle*, 13, 430
14. *Statute of limitations on demand contracts.*—The statute of limitations did not begin to run until the demand was actually made. *Rhynd v. Hyndman*, 3, 166

STATUTE OF LIMITATIONS. *Continued.*

15. *The statute of limitation and the rules as to presumptions from lapse of time are founded on the same principle. McBee v. Loftis,* 3, 223

16. *Runs after debt matures—Record of trust deed—Third parties.*—A suit to foreclose a trust deed was begun more than four years after the date of the deed but less than four years after the maturity of the bonds which it was given to secure. *Held*, that the action was not barred by the statute, and that the record of the deed secured the mortgagee against a subsequent incumbrancer to the same extent as against the mortgagor. *Bassett v. Monte Christo Co.*, 4, 108

17. *Statute of limitations against patent.*—Where plaintiff claimed title by Mexican grant confirmed by act of Congress and patent founded thereon: *Held*, that evidence of adverse possession in defendants prior to the date of plaintiff's patent was properly excluded, because the statute of limitations only began to run at that date. *Reed v. Spicer*, 4, 330

18. *Statute of limitations when applied between tenants in common.* *Union M. Co. v. Taylor*, 5, 323; *Huff v. McDonald*, 14, 263

19. *Statute of limitations in favor of deceased partner.*—After the death of one of the members of a copartnership, the statute of limitations begins to run in favor of his personal representatives against a claim to have an account of profits received by him. *Weisman v. Smith*, 11, 152

20. *Liability of stockholders.*—The limitation of two years in the Bankrupt Act, within which time the assignee must bring suit against any person "claiming an adverse interest touching any property or rights of property transferable to, or vested in, such assignee," applies to a suit in equity brought by the assignee of a bankrupt corporation to charge its shareholders on account of money due for the payment of their shares of stock, and the statute begins to run from the date of the assignment, and not from the date when the bankrupt court makes the assessment. *Foreman v. Bigelow*, 13, 270

21. *Amending complaint can not affect the statute as to land not originally included.* *Atkinson v. Amador Canal Co.*, 13, 428

22. *Statute of limitations does not begin to run until injury occurs.* *Backhouse v. Bonomi*, 13, 677

23. *Idem—Recent injury from old undermining.* *Id.*

24. *Facts insufficient to prevent the bar of limitation.* *Bicks' Appeal*, 14, 592

25. *Adverse possession of water.*—Although the plaintiffs may have had the prior right to water, yet if they or their grantors allowed the defendant to acquire and hold for five years adverse possession of the water which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute. *Davis v. Gale*, 4, 604

26. *In favor of trustees.*—Even if the directors were held to the liabilities of a trust relationship, six years would bar an action for misuse of the corporate property. *Watts' Appeal*, 8, 223

27. *Title to personality by limitation.*—In order that the title to personality may pass by the statute of limitations, there must be some

STATUTE OF LIMITATIONS. *Continued.*

act of dominion over it inconsistent with the right of the original owner, asserted by the party claiming the benefit of the statute.

Baker v. Chase, 12, 66

28. *Amendment as affecting statute of limitation.*—The plaintiff was allowed to amend his declaration so as to change the form of action from assumpsit to tort. The cause of action accrued more than six years before the amendment, but not before the bringing of the suit. *Held*, that the cause of action remaining unchanged, the statute of limitation was not a bar; otherwise, had the cause of action been changed. *Smith v. Bellows*, 12, 157

29. *The statute of limitations is applicable to all corporeal hereditaments.* *Armstrong v. Caldwell*, 13, 252

30. *The adverse possession of the mine by the owners of the surface for the statutory period, would give title; but it must be distinct from the possession of the surface. It is unaided by surface rights or occupancy.* *Id.*

31. *The possession to give title must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile.* *Id.*

32. *It is too late for executors to set up the statute of limitations, who made no suggestion thereof when made parties to a bill six years after the death of their testator, nor six years thereafter when they filed an amended bill.* *Alden's Appeal*, 13, 140

33. *Adverse possession by mining.*—If, during a part of the three years next after the recording of a tax deed, the former owner of the land, by himself, his agents or tenants, openly occupy it for mining purposes, the acts of mining not being merely occasional, fugitive and desultory, but as continuous as the nature of the business and customs of the country permit or require, this will be such an adverse possession as will interrupt the running of the statute of limitation in favor of the tax title claimant. *Stephenson v. Wilson*, 13, 408

34. *Affirmative aid to limitation title.*—A title acquired under the statute of limitations, may be quieted in the adverse holder upon a bill in equity, filed for that purpose, even against the holder of the paper title barred. *420 M. Co. v. Bullion Co.*, 11, 609

35. *The statute of limitations is applied with the same effect in a court of equity as in a court of law.* *Bickell's Appeal*, 14, 592

36. *Idem*—Complete adjudication in equity is possible, though the court of equity can not directly or indirectly reach beyond the statute. *Id.*

37. *When allowed without special plea.*—The benefits of the statute may be secured without a special plea by defendants, when the complaint is silent as to the foundation of the right sought to be enforced. *Gottschall v. Melsing*, 1, 667

38. *Adverse possession as a bar to ejectment.*—Two years' adverse possession being a matter of defense under the statute of limitations in this case, should be made to appear affirmatively. *Union M. Co. v. Taylor*, 5, 323

39. *Foreign corporation.*—A foreign mining corporation can not plead the statute of limitations in Nevada. *Robinson v. Imperial Co.*, 10, 871; *Union M. Co. v. Taylor*, 5, 323

STATUTE OF LIMITATIONS. *Continued.*

40. *The expression "cause of action" includes real as well as personal actions. Robinson v. Imperial Co.,* 10, 371

41. *Admissions in plea of limitation.*—The defendants, in an action of ejectment, pleaded occupation and possession by themselves for more than five years last past, and for more than "two years from the date of the issuance of the patent" to plaintiff. *Held*, that this was an admission that plaintiff was seized of the premises within five years. *Fremont v. Seals,* 11, 633

42. *Title by the statute of limitations is not available to a defendant failing to plead the same. Maine Boys' T. Co. v. Boston Co.,* 12, 247

43. *Plea of the statute.*—Where a bill alleges a fraudulent transfer of stock by an administrator, and his final discharge, but alleges a want of knowledge of the fraud until "long after the discharge," it does not appear from the bill that the action is barred by the statute of limitations. *Van Bokkelen v. Cook,* 13, 421

44. *The statute of limitations must be specially pleaded. Jennings v. Rickard,* 15, 624

45. *A finding of five years' actual possession claimed to amount to title under the limitation clause of the mining act (Sec. 2332), held for naught for variance under the California practice. Anthony v. Jilison.* 16, 26

See ADVERSE POSSESSION.

STIPULATION.

1. *Where parties stipulate in open court as to their respective sources of title, evidence in contradiction thereof is inadmissible. Rockwell v. Graham,* 15, 299

STOCK—STOCKHOLDER.

1. *Specific performance.*—Each of the shares of stock of a mining company being of equal value, a court of equity will not decree a transfer to plaintiff of the particular shares sued for. *Hardenbergh v. Bacon,* 1, 352

2. *Issue to defaulting contractor.*—The issue of the stock of a mining company to a firm which had subscribed to stock of a railroad company, and had entered into a contract with the railroad company to build a part of its road at the request of the mining company, the issue being approved by both directors and stockholders, is valid, although the contract to build the road was never carried out, and although the company may be in equity entitled to a return of its stock. *Savage v. Ball,* 2, 579

3. *Stock, paid up, in leasehold.*—The provision of the code allowing lands to be taken in payment for stock of mining corporations does not authorize leasehold interests to be so taken, so as to exempt stockholders from personal liability. *Basshor v. Dressell,* 3, 591

4. *Contract to deliver stock—Demand.*—Defendants contracted to deliver stock on or after a date named, upon demand. *Held*, that the contract being joint, and not a negotiable instrument, a demand upon one of the joint contracting parties was sufficient. *Rhynd v. Hyndman,* 3, 166

5. *Shares of stock bought in by company, afterward divided among*

STOCK—STOCKHOLDER. *Continued.*

the then stockholders *pro rata*; a stockholder who, between the time of the purchase and the time of such distribution, had assigned a part of his stock, sued the company for a *pro rata* of the shares, on the basis of the number held by him at the time of purchase. *Held*, that his action is an affirmation of the purchase, and he can not allege that the company's funds were misapplied; and that as to him, the distribution on the number of shares held by him at the time of distribution was equitable. *Coleman v. Columbia Oil Co.*, 3, 483

6. *Substitution of bonds for stock—Dividends.*—A portion of the stock had been exchanged for bonds by consent of plaintiff, the vendee advancing a bonus to perfect the exchange. *Held*, that the bonds took the place of the stock, and were followed by the contract, the bonus of course being deducted upon an accounting; and that the plaintiff had no interest in dividends received by the vendee or the defendant upon the stock. *Jones v. Kent*, 3, 190

7. *Bill by minority against majority of stockholders—In what cases maintainable.* *Hand v. Dexter*, 3, 608

8. *New stock in lieu of lost certificate, issued to innocent purchaser.* *Mandlebaum v. North Am. M. Co.*, 5, 506

9. *Stock of value—Mine of no value.*—The finding that a mine or a mining corporation has no value does not necessarily and of itself imply that the shares of the company have no value; they may have other property or paid up capital on hand. *Gifford v. Carvill*, 6, 558

10. *Diligence in notifying purchaser of loss of stock.*—The question whether a party who has lost stock by theft, as alleged, has used due diligence to prevent loss to third parties, can not arise before defendant shows himself to be an innocent purchaser for value. *Sierra Nevada M. Co. v. Sears*, 7, 549

11. *Title to stolen stock can not be passed by sale at auction and innocent purchase.* *Skillman v. Lachman*, 11, 381

12. *Stock paid for with property.*—Unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company, property needed for the purpose of its operations, and receive payment therefor in full-paid shares of the stock of the company, is, in the absence of fraud, binding upon the parties, and such stock is full-paid stock. *Phelan v. Hazard*, 12, 41

13. *Impeachment by creditor of mode of paying for stock.* *Id.*

14. *Risk of loss of personal remedy against stockholders.*—It is an ordinary risk to the buyers of stock that some of the shareholders may have the right to have their names removed as contributories. *Reese River M. Co., In re*, 13, 20

15. *Shares paid for in land at an over-valuation, in the hands of an innocent buyer for value, are paid-up shares.* *Foreman v. Bigelow*, 13, 270

16. *Holders of shares issued improperly (as for mines at an over-valuation) are to be distinguished from the holders of shares which the corporation had no power to issue.* *Id.*

17. *Administrator must account for foreign assets—Situs of mining stock.* *Van Bokkelen v. Cook*, 13, 421

STOCK—STOCKHOLDER. *Continued.*

18. *In determining who are stockholders*, the court will not inquire beyond the legal title, except where there has been a fraudulent transfer. *Adderly v. Storm*, 13, 435

19. *A resolution passed by the stockholders* does not bind the corporation. It can only act in the manner provided by its charter. *McCullough v. Moss*, 13, 440

20. *Warranting value of stock at a future date.*—Where the vendor warranted that the stock sold should be worth a certain sum upon a certain future date, he is not discharged by the fact that after the sale, but before the date fixed, the stock had reached the agreed figure. *Howley v. Brumagin*, 13, 464

21. *Note of stockholder for stock.*—By the act of July 18, 1863 (manufacturing companies) a note given after the organization of the company for additional stock is valid, notwithstanding the provision in the act that "no note given by a stockholder shall be payment of any part of the capital stock." *Hacker v. National Oil Co.*, 13, 533

22. *Insolvent corporation can not buy its own stock.* *Currier v. Lebanon Slate Co.*, 13, 559

23. *Power in equity to compel issue of stock.*—Where the board of directors of a corporation, in issuing new stock to the stockholders generally, refuse to issue to a particular stockholder his due proportion of such new stock, he may compel its issue to him by suit in equity against the corporation, there being sufficient of such stock undisposed of, notwithstanding his remedy at law for damages. *Dousman v. Wisconsin Co.*, 13, 573

24. *Suits to compel issue of stock must be several.* *Id.*

25. *A person who has not the legal title to the stock of a corporation* can not maintain an action against the company for converting it. *Morrison v. Gold Mt. M. Co.*, 13, 579

26. *Conversion of shares of stock by corporation.* *Id.*

27. *Unauthorized issue of stock—No remedy against innocent holder.* *Pratt v. Taunton Copper Co.*, 13, 590

28. *Discoverers incorporate—Error in issue of stock—Stock not void.*—Where the locators of a mining claim and their assigns consolidated their interests, and conveyed to the trustees of a corporation, which corporation was to issue stock to the parties who thus conveyed in proportion to the number of feet each had conveyed, and an error was made in the distribution of shares, the discoverer not being allowed for his additional claim, so that the others received more and the discoverers received less than their respective claims in feet entitled them to: *Held*, that the corporation was bound to purchase shares and transfer them to the discoverer, or pay him their value, or issue new shares to him, unless the full quota had been issued: *Held, further*, that the shares wrongfully issued to the other parties in excess of their proportion were not invalid. *Smith v. North Am. M. Co.*, 13, 599

29. *Limit of stock issue.*—A court can not order stock issued where the limit of issue has already been reached. *Id.*

30. *Liability of assignor of unpaid stock—Demand necessary.* *Ladd v. Cartwright*, 13, 607

STOCK—STOCKHOLDER. *Continued.*

31. *Evidence of value of stock at time of sale, can not concern value under certain improvements.* *Fitz v. Bynum*, 13, 612
32. *Certificates and shares distinguished.*—An action in the nature of trover will lie under modern decisions for the conversion of *shares of stock* as well as for the mere *certificate*. The scope of the action has been enlarged from what it was at common law. *Payne v. Elliot*, 14, 515
33. *Relations of the stockholders to the corporation stated.* *Barksdale v. Finney*, 14, 542
34. *Special injury to particular stockholder.*—A holder of corporation stock can not maintain an action against the company for damages in the depreciation of his stock, resulting from mismanagement of the affairs of the company, unless he shows that the injury he has sustained to his stock is peculiar to himself, and does not fall equally upon the other stockholders. *Oliphant v. Woodburn Coal Co.*, 15, 365
35. *With stock, quantity is equivalent to identity.* *Thompson v. Toland*, 2, 77
36. *The capital stock of a corporation is a trust fund for the payment of its debts.* *Foreman v. Bigelow*, 13, 270
37. *Title to stolen stock can not be passed to an innocent buyer at public auction.* *Pratt v. Taunton Copper Co.*, 13, 590
38. *Capital stock presumed to continue.*—Capital stock, paid into a corporation authorized to transact business, and divided into shares, is presumed to remain until its dissolution. *Com. v. Ocean Oil Co.*, 14, 126
39. *There is no special value or property in any particular share of mining stock, as distinguished from any other share, unless issued in the name of a party and charged to him upon the books of the company.* *Boylan v. Huguet*, 14, 508
40. *Shares of stock in conversion.*—Shares of stock in an incorporated company are recognized as a subject of conversion, and suit can be maintained therefor and a recovery of the value had. *Kuhn v. McAllister*, 14, 512
41. *Stock considered with reference to its quasi negotiable character.* *Mandlebaum v. North American Co.*, 5, 506; *Sherwood v. Meadow Valley Co.*, 13, 547
42. *Conversion of mining stocks.*—H. delivered to D., as collateral security, certain mining stocks assigned in blank, which D. filled up in his own name, and thereupon had new certificates issued to him. D. afterward transferred part of this stock, but took back blank assignments for the same, and the balance he transferred to E. as trustee. It also appeared that the stock remained under the control of D., and ready to be delivered to H. upon payment of his notes. *Held*, that the rights of H. had not been violated, and that the acts of D. did not amount to a conversion. *Day v. Holmes*, 2, 276
43. *Sale of mining stock—Dividends—Parol proof to explain.* *Brewster v. Lathrop*, 2, 552
44. *Transfer of stock—Collateral security—Depreciation.* *Howard v. Brigham*, 3, 1

STOCK—STOCKHOLDER. *Continued.*

45. *Caveat emptor applied to sale of stocks*—The rule of *caveat emptor* applies as well to the sale of stocks as of chattels. The vendor can only be made liable for misrepresentation or fraud. *Renton v. Margyott*, 10, 564
46. *Voting stock transferred by unregistered indorsement.* *State v. Pettineli*, 12, 513
47. *Collateral holder of stock liable for company debts.* *Adderly v. Storm*, 13, 435
48. *No implied promise.*—No implication of a personal promise of the transferee to pay assessments arises. *Frank's Oil Co. v. McCleary*, 13, 477
49. *From the voluntary payment of one assessment by the transferee, a promise to pay others can not be inferred.* *Id.*
50. *Shares of stock are alike, and a transfer thereof procured to be made by another would be a compliance with a contract to deliver.* *Wynkoop v. Seal*, 13, 493
51. *Transfer of stock not registered.*—A transfer of stock which has not been entered on the books of the company, as required by statute, is nevertheless valid for the purpose of enabling the assignee to maintain an action against fraudulent trustees who are wasting the corporate property and converting it to their own use. *Parrott v. Byers*, 13, 506
52. *Ratification of a sale made by a pledgee.*—If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make his margin good, and without sufficient notice of time and place, still, if the pledgor knew of the time and place of sale and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale. *Child v. Hugg*, 13, 513
53. *Identity of shares—Sale of stocks by bailee.*—Where a bailee of mining stock is at all times able, ready and willing to transfer to the bailor the same number of shares of similar stock, of the same company, and of the same value, the sale or conversion of the identical shares pledged only constitutes a technical breach of trust, and presents a case of *damnum absque injuria*. *Atkins v. Gamble*, 13, 514
54. *Exception to the rule where stock is concerned.*—Shares of stock in a corporation stand upon a different footing from other personal property, as regards the right to the recovery of the specific property, because they are mere evidences of interest in the business of the corporation, and, if all the shares are of equal value, there can be no reason for preferring one share to another. *Atkins v. Gamble*, 13, 514
55. *Unregistered transfers of stock under the laws of California,* except between the contracting parties, do not pass the title. *Bercick v. Marye*, 13, 544
56. *Transfer of stock of corporation before organization* does not bind the corporation. *Hawkins v. Mansfield M. Co.*, 13, 531
57. *Corporation stocks are transferable in such manner as may be prescribed by the by-laws.* *Williams v. Hanna*, 15, 73
58. *Sale of stock for less than par.*—Held, *arguendo*, that the officers

STOCK—STOCKHOLDER. *Continued.*

of a corporation can not properly sell the corporate stock for less than its par value. *Oliphant v. Woodburn Coal Co.*, 15, 365

59. *Income of a corporation is liable to taxation, whether declared in dividends or not.* *Com. v. Ocean Oil Co.*, 14, 126

60. *Contributories liable for previous debts.*—Shareholders in a trading company are liable to contribute on the winding-up for debts incurred previous to, as well as for debts incurred after, their purchase. *Mexican Co., In re*, 2, 86

61. *Contributories—Executory contract.*—Parties (Grisewood and Smith) held by a binding contract for the purchase of shares at the date of the winding-up order, such executory contract being, further, afterward completed, are liable as contributories. *Id.*

62. *Stockholders' liability as partners.*—Stockholders of a mining corporation do not become liable as partners, on notes given by the treasurer of the corporation, merely because, after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company. *Troubridge v. Scudder*, 3, 471

63. *The personal liability of stockholders can not be enforced in assumpsit, without a special count on the statutory liability.* *Youghioheny Co. v. Evans*, 3, 103

64. *Personal liability of incoming stockholders.*—The act incorporating the Rossie Lead Mining Company, rendering the stockholders liable for its debts, is applicable to persons owning stock when the suit is brought, and not to those who were stockholders when the debt was contracted. (*Per* LOTT and VAN SCHOONHOVEN, Senators; BARLOW and TALCOTT, Senators, *contra.*) *McCullough v. Moss*, 13, 440

65. *Liability of shareholders—Assessments of stock.* *South Mt. M. Co. In re*, 13, 615

66. *Stockholders may not attack the original judgment against corporation.* *Coalfield Co. v. Peck*, 13, 628

67. *Relation of prior agreement of organizers to subsequent stockholders—Paying up capital with land.* *Bailey v. Pittsburg Gas Co.*, 3, 599

68. *Stock calls paid by payments to creditors—Inference from presence at meeting of directors.* *Carr v. Le Fevre*, 3, 477

69. *The contract of the subscription.*—By the act of subscribing to the capital stock of an incorporated association, each associate undertakes to raise his proportion of the capital as it may be called for by the directors. *Merrimac M. Co. v. Levy*, 13, 467

70. *Duty to pay subscription is implied by.*—The law authorized the directors to call it in. *Id.*

71. *Personal liability.*—The articles of association under the law, contemplated a substantial capital for defined purposes; this was both to carry out the object of the corporation and for the protection of creditors, and therefore created a personal liability for the subscriptions. *Id.*

72. *Company to follow the stock.*—The company can indemnify themselves, only by a sale of the stock and pursuit of the original subscriber. *Frank's Oil Co. v. McCleary*, 13, 478

STOCK—STOCKHOLDER. *Continued.*

73. *Right of subscriber to demand stock*, follows the giving and acceptance of note for its amount. *Hacker v. National Oil Co.*, 13, 538
74. *Identity of stock not changed by re-issue*. *Hawley v. Brumagin*, 13, 464
75. *Status of assignee of stock*.—A purchaser from an original subscriber is substituted to his obligations as well as his rights, and, being accepted by the corporation, a privity is established between them. *Merrimac M. Co. v. Levy*, 13, 467

SUNDAY.

1. *Notice of rescission on Sunday*.—An objection that a notice of rescission was void because given on Sunday is without force, unless the result is effected by statutory provision, and the Nevada statute does not have that effect. *Pence v. Langdon*, 13, 33

SURFACE.

1. *Surface right restricted to coal breaker and dump*.—The grant of a surface right with a stipulation that it shall not be "for the purpose of laying out a town or building thereon, but only for the purpose of a coal-breaker and dirt-room for the deposit of coal-dirt" is the grant of an easement only, although described to be in fee. *Big Mountain Co.'s Appeal*, 5, 178
2. *Owner of minerals entitled to sufficient working surface*. *Turner v. Reynolds*, 12, 191
3. *Storing ore*.—Ordinarily, the mine owner can not justify the use of the surface for the lengthened keeping of his ore or other purpose incidental to his business. *Marvin v. Brewster Iron Co.*, 13, 40
4. *Relation between lode and surface ground*. *Wolfley v. Lebanon Co.*, 13, 282
5. *Mineral owner bound to ware his pits against surface owner's cattle*. *Williams v. Groucott*, 13, 632
6. *Relative rights of the several owners of surface and minerals*. *Smart v. Morton*, 13, 665
7. *Sic utere tuo*.—The upper and underground estates are governed as other estates, by the maxim, *sic utere tuo*. *Jones v. Wagner*, 13, 690
8. *Obligation to restore the surface* dependent on promise to owner is not to be pressed by another. *Wilson v. Waddell*, 14, 26
9. *Surface defined*.—The term surface is held to include, not merely the geometrical surface, but as well all strata superincumbent upon the mineral strata granted. *Yandes v. Wright*, 14, 33
10. *Necessary surface use implied*.—Express grant of all minerals or mineral rights in tract of land is, by necessary implication, the grant also to open and work the mines, and occupy so much of the surface as may be reasonably necessary for such purpose. *Williams v. Gibson*, 16, 243
11. *Extent of right to use, a jury question*. *Id.*
12. *No right to build coke ovens*. *Id.*
13. *Company store—Evidence of custom excluded*. *Id.*
14. *Company store*.—In ejectment for the surface of land used in

SURFACE. *Continued.*

working a mine, where it appeared that defendant had established a supply store, it is not error, for the purpose of testing the necessity of occupying the land for such purpose, to show that two other stores were located near the mine. *Id.*

See SEVERANCE; SURFACE SUPPORT.

SURFACE SUPPORT.

1. *Loss of surface support and flooding endangered by removing pillars.*—Held, that an injunction to restrain defendants from weakening the supports was properly granted. *Thomas Iron Co. v. Allentown M. Co.*, 8, 86

2. *Where a lessee is bound to take out all the coal*, he has the right to remove the pillars usually left for support. *Mine Hill Co. v. Lippincott*, 12, 555; same holding on similar covenant. *Shafto v. Johnson*, 15, 262

3. *Support of soil and buildings.*—All that can be claimed by the owner of the surface, under the right of subjacent support, is that no physical injury be wrought to the surface in its natural state, or as contemplated at the time of the grant. The mine owner is not bound to support buildings subsequently erected. *Marvin v. Brewster Iron Co.*, 13, 40

4. *Building on undermined lot, has no claim to support from adjoiners.* *Partridge v. Scott*, 13, 640

5. *Idem*—No grant presumed against party both ignorant and innocent. *Id.*

6. *Adjoiner not liable for subsidence.* *Id.*

7. *Injury to building by undermining*—Essential averments in complaint, stated. *Jefferies v. Williams*, 13, 645

8. *Distinction between "near" and "contiguous" lands* stated. *Id.*

9. *Special plea required.*—A right to mine so as to leave the soil or the building above it without support must be specially pleaded. *Id.*

10. *Construction of reservation as to surface support against coal mining.* *Smart v. Morton*, 13, 655

11. *Right implied in lease.*—There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. *Dugdale v. Robertson*, 13, 662

12. *Mines must leave support to buildings.* *Haines v. Roberts*, 13, 668

13. *United effect of old and new excavations causing buildings to sink.* *Brown v. Robins*, 13, 669

14. *Custom of leaving pillars for the time being and of returning to remove them after the land has been allowed to slowly settle*—in the statement of the case. *Id.*

15. *Exception of minerals*—With power to get them regardless of support. *Williams v. Bagnall*, 13, 686; *Yandes v. Wright*, 14, 82

16. *Mines servient to support.*—The mining property is servient to the surface to the extent of sufficient supports to sustain it, and on default the owners and workers are liable for damages. *Jones v. Wagner*, 13, 690

SURFACE SUPPORT. *Continued.*

17. *Usage to the contrary.*—To control the rule of the common law, a usage to mine without observing this duty, must be so ancient and uniform in the particular region as to amount to a custom. Such custom must be so ancient that the memory of man runneth not to the contrary. *Jones v. Wagner*, 13, 890; *Horner v. Watson*, 14, 1
18. *Power under lease to mine without leaving pillars.* *Smith v. Darby*, 13, 675; *Mine Hill Co. v. Lippencott*, 12, 555; *Shafto v. Johnson*, 15, 262
19. *Right of support yielded by grant.*—The subsequent purchaser of the surface will take subject to such grant. *Id.*
20. *Of natural right the surface is entitled to support from the strata below.* *Coleman v. Chadwick*, 14, 9
21. *Support at expense of the mineral.*—When the owner of the whole fee grants the minerals, reserving the surface, his grantee is entitled only to so much of the minerals as he can get without injury to the surface. *Coleman v. Chadwick*, 14, 9; *Wilms v. Jess*, 14, 56
22. *Custom to let down.*—A custom contrary to such right would not be reasonable, and, therefore, would be invalid. *Coleman v. Chadwick*, 14, 9
23. *Implied reservation of support.*—A grant of minerals and all privileges necessary for the convenient working, etc., of coal, and the rights "incident or usually appurtenant to working and using coal mines," does not affect the grantor's right to surface support. *Id.*
24. *Subsidence of land aided by excavations on intervening land.*—*Held*, that the plaintiffs had no right of action against the defendants. *Birmingham v. Allen*, 14, 14
25. *The support to which a land owner is entitled from the adjacent land is confined to such an extent of adjacent land as, in its natural, undisturbed state, would be sufficient to afford the requisite support.* *Id.*
26. *Right to exhaust minerals.*—The right to work mines is a right of property, which, when duly exercised, begets no responsibility. The owner of minerals has a right to take away the whole of them in his land, according to the natural course of user. *Wilson v. Waddell*, 14, 25
27. *Subsidence of surface—Injuries by consequent waterflow.*—Where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coal field, the injuries being entirely from gravitation and percolation, are not a valid ground for any claim of damages. *Id.*
28. *Upper seam entitled to support from lower.*—Where support is taken away an action lies; and in this case recovery by the owner of an upper coal seam against the owner of the lower seam was upheld. *Yandes v. Wright*, 14, 33
29. *Right to support of soil, absolute; to support of improvements, dependent.* *Gilmore v. Driscoll*, 14, 37
30. *Reserve of mines without obligation to support surface.* *Scranton v. Phillips*, 14, 48
31. *Exemption by contract from liability for caving.* *Scranton v. Phillips*, 14, 48; *Davis v. Treharne*, 14, 60

SURFACE SUPPORT. *Continued.*

82. *Incidental weight of buildings.*—Although the mine owner is not bound to leave support more than sufficient to stay the surface, yet, if a subsidence occur, the mere presence of a building will not prevent a recovery, unless it be shown that the subsidence would not have occurred without the aid of the buildings, and the mine owner will be liable for the damage both to the building and to the land.

Wilms v. Jess,

14, 56

83. *Idem—Where subsidence caused by added weight.*—The act of removing all supports from the superincumbent soil is, *prima facie*, the cause of its subsequently subsiding; but if the subsidence is, in fact, caused by the weight of buildings erected on the surface after the execution of a lease to the defendant authorizing him to take the mineral beneath the surface, that may be shown in defense as contributive negligence. *Id.*

84. *Surface destruction not allowed by implication.* *Davis v. Treharne,*

14, 60

85. *In every grant of mines there is an implied reserve of surface support.* *Proud v. Bates,*

15, 227

86. *Surface support not affected by reservation and way leave.* *Id.*

87. *Ditches.*—Right of surface support discussed. *Clark v. Willett,*

4, 629

TAILINGS.

1. *Use of channel.*—A miner is entitled to the free use of a channel of a creek, but he has no right to fill the channel of the creek with tailings and debris, and let it flow down upon another's ground. *Nelson v. O'Neal,*

4, 275

2. *Upper and lower claims—Right to deposit tailings.*—Where lower is the prior claim, upper has no easement or right to erect structure depositing tailings on lower. *Esmond v. Chew,*

5, 175

3. *Right of way.*—The fact of the relation of the mining claims to each other on the same stream, does not give the upper claimant a right of way of necessity over the lower claims. *Id.*

4. *Local custom must be averred and proved.*—If there is any local mining custom giving an upper claim the right to carry a flume and dump tailings upon a lower claim, such custom must be averred and proved. *Id.*

5. *Property in tailings and pay dirt lies in those who produce them.* *Jones v. Jackson,*

14, 72

6. *Locating place of deposit for tailings.* *Id.*

7. *If a miner allows his tailings to mingle with those of other miners,* this would not give a stranger a right to the mixed mass; but it may be a circumstance to prove an intention of abandonment. *Id.*

8. *Where tailings are allowed to flow upon the ground of another,* he becomes entitled to them. *Id.*

9. *Joint damage by tailings of defendants and others.* *Bell v. Schultz,* 14, 77; *Keys v. Little York Co.,*

14, 95

10. *No absolute right to liberate tailings to the injury of another,* though a subsequent locator. *Lincoln v. Rodgers,*

14, 79

11. *Custom of free tailings restricted.*—The proof of a custom allow-

TAILINGS. *Continued.*

ing tailings to run free, will not justify the first locators in allowing their tailings to run so freely as to prevent mining operations below. The doctrine of free tailings can not, without restriction, be maintained. *Id.*

12. *Location of claims, especially for tailings.* *Jones v. Jackson*, 14, 72; *Lincoln v. Rogers*, 14, 79; *Rogers v. Cooney*, 14, 85

13. *Necessary injuries to lower claims.*—Under peculiar circumstances, the first locators, in the reasonable prosecution of their mining operations, might be justified in working some necessary injury to locators below, which injuries would be *damnum absque injuria*. *Lincoln v. Rogers*, 14, 79

14. *Tailings an accretion to the land belong to owner of land.* *Rogers v. Cooney*, 14, 85

15. *Right to run tailings through another's flume.*—A party mining upon a ravine which runs into another ravine is not clothed, by virtue of his right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in, at any point he may select, upon the tail-race of another constructed upon the other ravine. *Gregory v. Harris*, 14, 91

16. *Letting loose sediment down on neighbor's land.*—Where such descent is the direct result of the act of such party, and not the mere result of the law of gravitation, the person whose land is thus injured may recover damages, and enjoin the future commission of said acts. *Robinson v. Black Diamond Co.*, 14, 98

17. *Relief in chancery.*—The covering up of claims with tailings, rendering their development and the ascertainment of their value impossible, is a wrong for which the law affords no adequate remedy, and therefore equity has jurisdiction. *Fuller v. Swan River Co.*, 16, 363

18. *Custom to let tailings go invalid.* *Id.*

19. *Value unascertainable.*—Where an injunction is sought against interfering with the development of plaintiff's mining claim, it is no objection that it does not appear how valuable plaintiff's claims are, it being impossible to estimate their value until their character has been demonstrated by development. *Id.*

TAX.

1. *Annual payments are not annual profits.* *Foley v. Fletcher*, 4, 130

2. *Foreign miner's tax.*—The Revenue Act of 1880, which declares that no person who is not a citizen shall be allowed "to take gold from the mines of this State," without a license: *Held*, to refer only to public lands of the State or United States, and not to the private property of individuals. *Aa He v. Crispen*, 10, 367

3. *Salable value.*—The law requires all property to be assessed for taxation at its actual value; the amount it will sell for at public sale made under authority of law is a good *prima facie* criterion of such value, and will not be overcome by a valuation made by an assessor, with the consent of the owner, in a previous year. *State v. Randolph Township*, 14, 163

TAX. *Continued.*

4. *The income of property is no criterion for an assessor in making a valuation. Id.*
5. *Comparative valuation no test. Id.*
6. *Where an assessment is reduced by the commissioners of appeal, the assessment merges in the judgment of the commissioners; and in the absence of any evidence that the amount fixed by the commissioners is too great, the court will not interfere. Id.*
7. *Reduction, pro tanto.*—If more tax is assessed than authorized by the proper authorities, the assessment will be set aside to the extent of such excess, and each person against whom an assessment is made will be entitled to a *pro tanto* reduction. *Id.*
8. *Taxation after severance of surface and mineral rights. Logan v. Washington County,* 14, 108
9. *Idem*—*Separation not to increase valuation. Id.*
10. *A mining "Claim" is property and liable to taxation, though only a possessory title. Forbes v. Gracey,* 14, 188; *People v. Black Diamond Co.,* 14, 162; *State v. Moore,* 14, 110; *Hale v. Storey County,* 14, 115
11. *The term "property in lands" construed to include mining claims. State v. Moore,* 14, 110
12. *Conjectural value of mining claim.*—There is no force in the objection that the value of a mining claim, which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture. *Id.*
13. *Value, standard of,* is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands. *Id.*
14. *Exemption not to be evaded.*—The legislature having expressly exempted mining claims from the operation of the Revenue Act, it can not be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. *Id.*
15. *Money invested in the purchase and opening of mining claims,* is not within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce or business whatsoever." *Id.*
16. *Taxation of the possessory right is not a violation of the organic act* which prohibits the territorial legislature from taxing the property of the United States. *Hale Co. v. Storey County,* 14, 115
17. *Ore tax in Nevada. City of Virginia v. Chollar Potosi Co.,* 14, 120
18. *Tax on out-put—Mines exempt.*—The constitution of Nevada declares the proceeds alone to be taxable. *Id.*
19. *Tax on corporate net income—Income defined. Com. v. Ocean Oil Co.,* 14, 126
20. *Sworn statement must show amount and value of product. State v. Kruttschnitt,* 14, 180
21. *Review of the Nevada system of taxing ores with the dictum that the tax on ores is more favorable to the mining interest than would be direct taxation of the mines. Id.*

TAX. *Continued.*

22. *The collection of ore tax quarterly* does not amount to more than a regular *pro rata* tax on the whole annual proceeds, and does not operate to make the mines pay more than that, even when the item of interest is considered. *Id.*

23. *The difference in value between gold and currency* is not affected by the fact that both are legal tender. *Id.*

24. *Sworn statements not conclusive.*—The assessor is not bound by the sworn statements required by law to be furnished him by the taxpayer. *Id.*

25. *The formula of assessment* stated in detail in the opinion of BEATTY, C. J. *Id.*

26. *Assessment roll in hands of collector can not be altered.* *State v. Manhattan Co.,* 14, 149

27. *State taxes need not be levied by county commissioners.* *Id.*

28. *County taxes must be levied by commissioners.* *Id.*

29. *No equalization of taxes necessary where no injustice complained of.* *Id.*

30. *Complaints as to assessments on proceeds of mines.*—A taxpayer on the proceeds of mines may complain of inequality of assessment upon him at any time before the taxes are collected or sued for. *Id.*

31. *Special tax on stock of foreign mining corporations, held constitutional.* *Atty. Gen. v. Bay State Co.,* 14, 158

32. *Exemption Act construed to be void.*—The Revenue Act, in so far as it attempts to exempt possessory claims and improvements upon the public mineral lands from taxation, is void. *People v. Black Diamond Co.,* 14, 163

33. *Income—Exhausted coal.*—The value of the coal exhausted of the capital of a coal company is not to be deducted from the receipts in estimating its net earnings. *Com. v. Penn Co.,* 14, 163

34. *Taxes on proceeds of mines—When \$15 per ton exemption applies.* *State v. Eureka Co.,* 14, 165

35. *Legislative intent of act to tax net proceeds.* *Id.*

36. *Omission of "dollar mark" in tax assessment roll held to not vitiate.* *Id.*

37. *Irrelevant matter in "statements" of proceeds of mines does not vitiate.* *Id.*

38. *Object of notice by assessor of unpaid taxes on mines.*—The written notice required by section 7 of the mining tax law, to be given by the assessor to parties engaged in reducing ores, is not a prerequisite to liability of the producer for the tax, but only intended to hold a party reducing ores extracted by others to the extent of the value of the ores in his possession when notified. *Id.*

39. *Quarterly collections.*—There is nothing in the use of the word "manner" in section 10 of the mining tax law, which provides that the collection shall be enforced in the same manner as on other kinds of personal property, to prevent the collection of such taxes quarterly; the word "manner" as there used does not mean "time." *Id.*

40. *Special tax against particular mine owners, upheld.* *Weber v. Reinhard,* 14, 175

41. *Inequality does not make tax unconstitutional.* *Id.*

TAX. Continued.

42. *Collection by action.*—It is competent for the legislature to provide for the collection of a tax by action in the courts. *Id.*

43. *Landlord liable.*—The owner of land had leased it for a term of years. *Held*, that he, and not the lessee, was liable for the tax. *Id.*

44. *Tonnage tax on ore held void.* *Jackson Co. v. Auditor Gen.*, 14, 182

45. *Ore out of U. S. lands.*—The ores when dug or detached from such lands under a mining claim, are free from any lien, claim or title of the United States, and becoming personal property are, as such, subject to the State taxation in like manner as other personal property. *Forbes v. Gracey*, 14, 183

46. *Mines "and mining claims"* distinguished. *Id.*

47. *Silver Bullion* is such property as is liable to taxation. *Hope M. Co. v. Kennon*, 14, 189

48. *The exemption of mines from taxation* does not extend to the product of such mines. *Id.*

49. *Exemption is the exception* and taxation the rule. *Id.*

50. *Duplicate taxation.*—The fact that the stock of a mining corporation is divided into shares and that these shares are subject to taxation, does not make the product of its property exempt; if such result amount to duplicate taxation it is not, therefore, invalid. *Id.*

51. *Tax on oil pipe line.*—A corporation engaged in the removal of petroleum from place to place by means of pipes, is a transportation company within the meaning of the 4th section of the act of April 24, 1874, and the 5th section of the act of March 20, 1877, and is subject to the tax imposed by said acts. *Columbia Co. v. Com.*, 14, 197

52. *Losses not deducted.* *Id.*

53. *Exemption of mines from taxation does not exempt improvements.* *Gold Hill Co. v. Caledonia Co.*, 14, 202

54. *Municipal taxation, of property not benefited by the municipality.* *Id.*

55. *Surface exempt.*—Surface ground taken up as part of a mining claim is clearly within the words used in the constitution exempting "mines and mining claims" from taxation. *Id.*

56. *Delinquent list.*—The failure to enter the tax on the delinquent list before the commencement of the action is not essential to a recovery. *State v. Northern Belle Co.*, 14, 211

57. *Second assessment.*—Where the assessor has made an irregular and void assessment this does not invalidate a second assessment made in conformity with the law. *Id.*

58. *Time of assessment.*—The statute prescribing the time for making assessment on ore-proceeds is directory merely; any irregularity in that respect is a defense only to the extent that the taxpayer has been injured thereby. *Id.*

59. *Exemptions under Nevada statute.*—A company working ores on the Freiberg process is not entitled to an exemption of \$15 per ton in addition to the actual cost of reduction. *Id.*

60. *Property owned at date of assessment.*—As a rule the statute does not require that a corporation or an individual shall be liable to

TAX. *Continued.*

taxation for personal property owned at any time during the fiscal year, but only upon what was owned on the 1st day of May. *Stanley v. Little Pittsburg Co.*, 14, 24

61. *Taxation a matter for the legislative department.* *Id.*

62. *The annual amount of the net proceeds of mines is not liable under the statute to taxation as such.* *Id.*

TENANT IN COMMON.

1. *If one partner having become associated in the development of a claim, voluntarily leaves it in possession of his co-partners and refuses to bear his just proportion of expense, and afterward brings his action to recover his interest, equity would, upon a proper showing, stay his relief until he had paid his full proportion of expense.* *Mallett v. Uncle Sam Co.*, 1, 18; *Early v. Friend*, 14, 271

2. *Possession of tenants in common, inter se.*—The possession of one tenant in common is possession of all, but this rule does not apply where one tenant claims to hold adversely to the others. *Partridge v. McKinney*, 1, 185; *Mallett v. Uncle Sam Co.*, 1, 18; *Van Valkenburg v. Huff*, 9, 467

3. *Deed of co-tenant by metes and bounds, void.* *Hartford Co. v. Miller*, 3, 353

4. *Rule applied in this case.*—M. owned the soil of a certain tract in fee and one undivided seventh interest in the minerals. He conveyed a portion of the tract by metes and bounds and his interest in the ore rights under the particular portion conveyed. *Held*, that such deed was inoperative as against his co-tenants. *Id.*

5. *Reason of the rule—Defeated by acquiescence.*—The reason of the rule is the prejudice to the rights of the other co-tenants by so parceling the property. But the co-tenants having acquiesced by releasing to M., all parties are estopped, and the title is confirmed in the purchaser. *Id.*

6. *Injury to plaintiff's flume by consent of his co-owner.* *Held*, a good defense to the action for damages by the non-consenting co-owner. *Crory v. Campbell*, 3, 270

7. *All co-owners are bound by the acts of each.* *Id.*

8. *Associate operating in aid of third party.*—A part owner in a contract for the purchase of a mine can not use the same for the purpose of obtaining the title to the mine for a third party, without the consent of his associates. *Delmonico v. Roudebush*, 3, 195

9. *Division of profits.*—In such case, his associate is entitled to share in the property obtained by such part owner for his individual benefit through the use of such contract in proportion to his interest in the contract so made use of. *Id.*

10. *Mixed consideration.*—Such claim for division will not be defeated by the fact that the property obtained by such part owner was not solely in return for the use of such contract. *Id.*

11. *Facts of the case, and result.*—A and B were part owners of a contract for the purchase of a claim to a mine. A used such contract for the purpose of procuring such claim for C without the consent of B, and also secured another outstanding title for the benefit of C. In return for these services, C gave A an interest in the mine. *Held*,

TENANT IN COMMON. *Continued.*

that B was entitled to an interest in A's share of the mine, proportionate to B's interest in the original contract. *Id.*

12. *Sale by tenants in common to tenants in common.*—H. and P. were tenants in common of a mining ditch. H. conveyed all his interest to defendant, and P. all his interest to plaintiff by a deed of later date. *Held*, that neither of the grantors could be considered as having conveyed against the will of the other, and that their grantees, the plaintiff and defendant, became tenants in common. *Reed v. Spicer*, 4, 380

13. *Joinder of co-tenants* is essential in an action for diverting water by ditch. It is an error for them to sue separately. *Parke v. Kilham*, 4, 523

14. *Tenancy in common presumed—Parties.*—The averment that the plaintiffs owned seven-tenths of the canal raises the legal presumption that they owned it as tenants in common, and in California tenants in common may sue jointly, or if one be dead his administrator may join with the other tenants. *Reynolds v. Hosmer*, 4, 658

15. *Purchase by one of several joint bidders.*—Although parties may have negotiated jointly for a purchase, yet if there has existed no confidential relation between them the purchase by one of them for his own benefit can not be set aside. *Tatham v. Lewis*, 6, 670

16. *Co-tenants not partners.*—A mere co-tenancy does not establish a partnership so as to establish a relation of trust and confidence. *Tuck v. Downing*, 7, 84

17. *Co-tenants may purchase of each other*, and the purchase by one co-tenant of the interest of another will not inure to the benefit of all who retain an interest in the property. *First Nat. Bank v. Bissell*, 11, 546

18. *Ouster of tenant in common—Statute of limitations.*—The taking possession of the whole mining claim by one tenant in common under a conveyance hostile to the title under which the co-tenancy exists, and excluding the co-tenant, is an ouster, from the date of which ouster the statute of limitations begins to run in favor of the tenant so taking exclusive possession. *420 M. Co. v. Bullion Co.*, 11, 608

19. *No fiduciary relation after such ouster.* *Id.*

20. *Transfer of single share among common owners.*—The withdrawal of one member from all participation in the affairs of a mining company, another taking his place and representing the interest, is a change of possession as to that interest. *Patterson v. Keystone Co.*, 13, 171

21. *No equity jurisdiction on bill by co-tenant of mine against surface owner.* *Adam v. Briggs Iron Co.*, 13, 225

22. *Title to Cornwall ore banks.* *Coleman's Appeal*, 14, 221

23. *Plea of non tenent insimul.*—Under the plea of *non tenent insimul*, it may be shown that the parties had barred themselves by covenant from partition. Such plea is the general issue, and means that the parties do not hold together so as to be entitled to partition. *Id.*

24. *Division of profits by several workings.*—The agreement pro-

TENANT IN COMMON. *Continued.*

vided that neither of the parties should interfere or interrupt the others at any mine holes by them opened and occupied for the purpose of raising ore: *Held*, that this was not a mode of providing for the enjoyment in severalty of the shares of the parties. *Id.*

25. *Idem.*—This provision meant that the parties should be undisturbed in their rights as tenants in common to take and use their respective proportions of ore, and was a grant to open and occupy other mine holes. *Id.*

26. *Usufruct.*—As to *fructus industriales*, a tenant in common does not receive more than his share, within the statute of Anne, if he merely has the sole enjoyment of the property, though, by the employment of his own industry and capital, he makes a profit by the enjoyment and takes the whole of it. *Id.*

27. *Assumpsit*—Ore paid for by mistake.—One tenant in common can not maintain assumpsit against another to recover the price of certain ore, paid by the former to the latter under the mistaken supposition that the latter, the defendant, had exclusive title to the land where the ore was dug. Account-render would be the proper remedy. *Irvine v. Hanlin*, 14, 241

28. *Expenses of litigation.*—The defendants while in possession of the premises incurred expenses in defending their title at law against a person claiming by title paramount: *Held*, that the complainants were not bound to contribute their proportion of expenses in defending against such suit. *Allen v. Barkley*, 14, 246

29. *Lessees are co-tenants.*—A lessee of a part interest is a co-tenant, and as such liable to action of account. *Barnum v. Landon*, 14, 250

30. *Each liable to all the others.* *Id.*

31. *Measure of accountability to co-tenant.*—He is accountable for all that he receives beyond his just share and for interest on its value at a legal rate. *Huff v. McDonald*, 14, 262

32. *Property occupied exclusively by one of the co-tenants*—Rule of accounting in such case. *Early v. Friend*, 14, 271

33. *Co-tenants unwilling to adventure the risks* have no right to claim any share in the profits. They are entitled only to their proportion of a fair rental value of the premises. *Id.*

34. *Shaft to get the common minerals, opening on separate estate.* *Clegg v. Clegg*, 14, 289

35. *Expenditures made by a tenant*, inure to the benefit of all the lessors; it is not the individual outlay of the tenant, but accrues to the common benefit of the associate in the common purpose under which the tenant worked. *Id.*

36. *Jurisdiction of equity.*—A court of equity has no jurisdiction of a bill brought by one tenant in common against an alleged co-tenant to obtain the possession and enjoyment of mining rights and privileges founded on legal title, until those rights have been established at law. *North Penn'a Co. v. Snowden*, 14, 294

37. *Joint tenants.*—A conveyance to two without the words "to be held as joint tenants and not as tenants in common" creates a tenancy in common, without survivorship; and a deed to trustees is to be construed in the same manner. *Boston Co. v. Condit*, 14, 301

TENANT IN COMMON. *Continued.*

38. *One tenant in common can not convey* his right to any specified portion of the premises or any right in the same, as the right to dig ores, to the prejudice of his co-tenants. Such conveyance is void as to the co-tenants though good as against the grantors. *Boston Co. v. Condit*, 14, 801; *Marsh v. Holley*, 14, 687

39. *Several use of common property.*—Tenants in common may use and enjoy the common property severally and need not account for the rents and profits, except under the statute for so much as they may receive beyond their just share. *Graham v. Pierce*, 14, 308

40. *Measure of co-tenant's accountability.*—The best measure of the accountability of one who uses the common property severally is his co-tenant's share of a fair rent of the property so used; but under peculiar circumstances resort will be had to an account of issues, profits, etc. *Id.*

41. *Single co-tenant may not mine.* *Murray v. Haverty*, 14, 825

42. *Getting coals, when not waste.*—It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals; he, the working tenant, not appropriating to himself more than his share of the proceeds. *Job v. Patton*, 14, 829

43. *Same person tenant in common under adverse titles.* *Clark v. Jones*, 14, 842

44. *Tenants in common of oil with right to surface—Exclusive use of surface by mineral owner with right to subdivide.* *Bronson v. Lane*, 14, 848

45. *The right of the other co-tenants to dig ore and deposit the rock on the surface is not an incumbrance*, such as to prevent any co-tenant giving perfect title. *Marsh v. Holley*, 14, 687

46. *License by one co-tenant.*—A license to dig ore in a mine given by one tenant in common extends only to his own interest therein. *Omaha Co. v. Tabor*, 16, 184

47. *Single co-tenant seeking patent in his own name.*—Where one of several co-tenants applies for and obtains patent of the United States for mining property held in common, the co-tenant not named in the application may adverse, but if he fail to adverse, the applying co-tenant will take the title as trustee for the benefit of all the owners, and his co-tenant not named in the patent may assert his rights by bill in equity. *Sawyer v. Turner*, 16, 260

TENANT FOR LIFE.

1. *Opening new pits.*—Tenant for life may open new pits or shafts for the working of the old vein. *Clavering v. Clavering*, 14, 858; *Neel v. Neel*, 14, 868; *Gaines v. Green Pond Co.*, 15, 158. *The same as to quarries and timber.* *Lynn's Appeal*, 15, 126

2. *Remainderman may work open mines.* *Clavering v. Clavering*, 14, 858

3. *When royalty goes to remainderman.*—Toll reserved on a lease of a mine made by tenant for life under a power, will go to the remainderman. *Bassett v. Bassett*, 14, 859

4. *Reservation in lease descends to remainderman.* *Id.*

5. *Construction of devise of profits of coal mining among children and survivors.* *Briggs v. Davis*, 14, 885

TENANT FOR LIFE. *Continued.*

6. *Account—Estrepelement.*—If our courts, under their chancery powers, may direct an account between tenants for life and those in remainder as to coal mined by the life tenant, yet estrepelement is not the remedy for obtaining relief in such a case. *Irwin v. Covode*, 15, 120

7. *Facts of the case—Land sold to coal company.*—A tenant for life, claiming under a will, sold to a coal company all her right, title and interest to the coal in the land, without limit as to the quantity of coal to be taken therefrom: *Held*, that estrepelement did not lie in favor of those entitled in remainder, to restrain the company from working, largely for sale, a mine which had been worked during the life of the testator for the use of the farm and for sale in the neighborhood. *Id.*

8. *The rights and privileges of tenant for life, are greater in Pennsylvania than under common law in England.* *Lynn's App.*, 15, 126

TENDER.

1. *Tender of re-conveyance.*—As a general rule, where there is an executed contract to recover back the purchase money on the ground of a defect of title, an action can not be maintained without the tendering of a re-conveyance. Rescission on the ground of fraud, failure of consideration, etc., is a right in equity to a restoration of the consideration, and the party claiming the restoration must return the property attained, or re-convey the title. *Babcock v. Case*, 6, 619

2. *No tender required of worthless consideration.* *Id.*

3. *Pennsylvania practice—Tender after trial.*—A condition in the verdict to re-convey would do equity. After verdict, if it appear that a re-conveyance ought to be made, the court can restrain execution until it be made. *Id.*

4. *Tender of deed into court.*—Making and filing with the clerk, of a deed of release, after suit brought, allowed in this case. *Burns v. McCabe*, 7, 1

5. *Tender waived.*—The refusal of the defendants to deliver the oil, excused the plaintiffs from tendering payment. *Forsyth v. North Am. Oil Co.*, 11, 115

6. *Breach of stock contract—Tender, when not necessary.*—If the demand be properly and sufficiently made, and the purchaser be prepared to pay at the time and place, this is sufficient. *Wheeler v. Garcia*, 13, 481

7. *Offer to return, necessary before contesting note given for stock.* *Fitz v. Bynum*, 13, 613

8. *Release by vendee.*—The vendee who has placed his bond on record so as, to that extent, to cloud the vendor's title, can not treat the contract as rescinded and recover a partial payment without first tendering a release thereof. *Marsh v. Holley*, 14, 638

9. *Return of purchase money.*—Where the vendor receives part of the purchase money, he must, before seeking relief in equity against the vendee, return or offer to return the amount received, with interest. *Hamill v. Thompson*, 14, 696

10. *A tender of compensation made in good faith and refused, though informal, will in equity throw the costs on the party who should have accepted it.* *Coal Creek M. Co. v. Moses*, 15, 544

TIMBER.

1. *Tenant for life.*—Tenant for life, liable to waste, having sold timber can not prevent the vendee from cutting it. *Wentworth v. Turner*, 7, 249
2. *Statute of frauds.*—Agreements for the sale of growing timber, not made with a view to immediate severance, are contracts for the sale of interests in land and within the statute of frauds. *Huff v. McCauley*, 9, 268
3. *Timber and minerals allied.*—The law of timber and of minerals is, in principle, the same. *Buckley v. Howell*, 13, 245
4. *Public lands open to first appropriator.* *Turtar v. Spring Creek Co.*, 14, 371
5. *The first appropriator* of land acquires the right to its peaceable enjoyment, including the trees growing thereon. *Rogers v. Soggs*, 14, 375
6. *Timber as between miner and ranch claimant.*—A mining claimant can not take the timber found growing on a neighboring ranch claim, on pretense of the necessities of the mine. *Id.*
7. *Government property in timber—Trespass.*—Although the timber on the public lands belongs to the United States, and its cutting is prohibited by law, this is no defense to trespass for taking timber, brought by the owner of the claim on which it was cut against the party who has taken it. *Id.*
8. *Occupants of public lands may cut timber.* *U. S. v. Nelson*, 14, 381
9. *Miner's relations to timber on the claim.* *Id.*
10. *Whether the timber-cutting is incidental to the mining* or the mining only a pretext to acquire the timber, is a question of fact upon the circumstances. *Id.*
11. *Miners may not cut to sell.* *Id.*

TIME.

1. *Extension.*—Where an executory contract for sale of mines was accompanied by a covenant on the part of the purchaser to open them, and an extension of the time was alleged to be proved by certain letters produced, *held*, that the court must determine as matter of law the effect of such letters, and whether they referred to an extension of all the terms of the contract, or related specially to an extension of time to open the mines only. Second, that an extension of time in general terms would relate to all the terms of the contract. *Luckhart v. Ogden*, 2, 603
2. *Reasonable time.*—A contract for an extension of time being silent as to the duration of such extension, the law implies that it shall be for a reasonable time, and the question, what is a reasonable time, is one of law to be determined by the court from the facts. *Id.*
3. *Reasonable time a question for the jury.* *Shepler v. Scott*, 2, 674
4. *Evidence that a written contract was limited by parol to a particular time* must be both positive and clear. *Id.*
5. *Reasonable time, where the facts are not disputed* is a question of law for the court. *Morgan v. McKee*, 3, 129; *Leaming v. Wise*, 7, 41
6. *Time is not of the essence* of an executory contract for purchase

TIME. *Continued.*

of land where the delay has been acquiesced in and the vendee allowed to continue in possession, although sudden and immense value has accrued to the premises by discovery of gold thereon. *Falls v. Carpenter*, 6, 397

7. *Essentiality of time* in contracts concerning oil property recognized. *Christie's Appeal*, 9, 42

8. *Fractions of day will not in general be considered*, and the *prima facie* presumption is that the several acts in the course of legal proceeding, when done on the same day, were performed in the order necessary to give them legal effect. But whenever an inquiry into the priority of such acts becomes necessary to protect the rights of parties, the presumption must give way to the facts. *Knowlton v. Culver*, 12, 682

9. *Time of the essence of mining contracts*.—In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion, and on the lessor's default, may rescind the contract. *Macbryde v. Weeks*, 13, 346

10. *Time is of the essence of the contract*, where one co-adventurer has borne the entire burden, and the other appears only at the end to claim to share the profit. *Willis v. Forney*, 14, 389

11. *Option to pay or re-convey*. *Hargrave v. Smith*, 14, 395

12. *Time as affecting the question of tender*, considered. *Fisher v. Worrall*, 14, 624

13. *Time to perfect title*.—The vendor is entitled to a reasonable opportunity to make a good title. *Marsh v. Holley*, 14, 688

TIN STREAMING.

1. *Right to flow may be acquired by grant, prescription or custom*. *Carlyon v. Lovering*, 14, 397

TITLE BOND.

1. *Only an option till accepted*.—A title bond executed by the owner of the property only, gives to the obligee an option to purchase, but not being a mutual obligation binding upon both contracting parties, is enforceable only by acceptance and performance of conditions during the continuance of the option. *Finerty v. Fritz*, 1, 438

TOWN SITE.

1. *Town lots on mineral lands*. *Martin v. Browner*, 1, 613

2. *Miner's need of lot a question of fact*. *Courchaine v. Bullion Co.*, 12, 236

TRESPASS.

1. *Right to nominal damages*.—The law presumes damages from a trespass. A contrary instruction is error. *Attwood v. Fricot*, 2, 305

2. *Trespass against one in peaceable possession*.—An action for damages for trespass will lie against one who has been in the exclusive and peaceable possession of property for a month or more if his first entry was that of a trespasser. *Meyers v. Farquharson*, 3, 217

3. *Special title in stranger—No defense to trespass*. *Wallace v. Silsby*, 3, 390

TRESPASS. *Continued.*

4. *Separate actions for a series of trespasses.*—Where part of the coal was raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass under Stat. 3 and 4 W. 4, c. 42, s. 2, for so much as was raised within the six months, and also money had and received for so much as was raised before, the acts being distinct, and the two actions therefore not incompatible. *Powell v. Reese*, 5, 678

5. *The purchaser of lands can not recover for antecedent trespasses.* *Williams v. Pomeroy Coal Co.*, 6, 195

6. *Trespass distinguished from nuisance.* *Id.*

7. *Possession to maintain trespass.*—Naked possession will sustain trespass against a wrongdoer, but will not prevail against a party having title and right of entry. *Fuhr v. Dean*, 6, 216; *McCarron v. O'Connell*, 14, 429

8. *Damages, lessor against trespasser*, may amount, at least, to the extent of the royalty he should have received from the lessee. *Stockbridge Iron Co. v. Cone Iron Works*, 6, 317

9. *The measure of damages is the value of the ore as it lay in the bed.* *Id.*

10. *Party leasing lands of stranger liable for the rents.* *Hawesville v. Hawes*, 7, 198

11. *Measure of damages in trespass by plaintiff out of possession.* *Bracken v. Preston*, 7, 267

12. *Waiver of trespass.*—Where mineral has been taken by trespass and converted into money the tort may be waived and assumpsit brought for the proceeds. *Alderson v. Ennor*, 8, 526

13. *Trespasser settling with pretended lessee.*—The defendant in an action for trespass, in taking coal from plaintiff's land, can not take shelter under an alleged settlement and accounting with a party who has accepted a lease of the coal land from the plaintiff, but who has never made an entry thereunder. *Austin v. Huntsville Coal Co.*, 9, 115

14. *Trespass by lessor—Outstanding lease.*—The owner of coal lands may maintain trespass for the invasion and injury of his possession by mining coal, and for the permanent injury to the freehold caused thereby, although there is an outstanding lease for the same premises, provided possession has not been taken under the lease. *Id.*

15. *Forcible resistance to trespass.*—Sufficient force to prevent it may be used by owner of mine in possession. *Riddle v. Brown*, 9, 219

16. *Evidence of malice to prove excessive force.*—Evidence of personal feeling and of previous threats, though uncommunicated to defendant, is admissible upon the question of whether excessive force was used in preventing a trespass upon the ore bank of defendant. *Id.*

17. *Act legalizing trespass strictly construed.* *Fitzgerald v. Urton*, 12, 198

18. *Title in trespass quare clausum.*—If plaintiff can not show actual and exclusive possession of the land, but is obliged to rely upon his legal title, he must show a valid title. *Stephenson v. Wilson*, 13, 408

19. *Idem—Tax title claimant not an intruder.* *Id.*

TRESPASS. *Continued.*

20. *Receipt condoning trespass.*—A receipt in full from an authorized agent for rent is a full discharge, being subsequent to the alleged trespass, though the officer may never have accounted for the money received. *U. S. v. Gear*, 14, 408

21. *Trespass by party in constructive possession.*—A warrant for unimproved land gives to the owner of it a constructive possession of the land which will enable him to maintain trespass for digging ore upon it, against one who has not an actual adverse possession of the land. *Baker v. King*, 14, 404

22. *Trespass pending ejectment and adverse claims.*—From the time that a caveat is entered until the right to the patent is determined, in ejectment, neither party (unless in actual possession) has such a title as will sustain an action of trespass against the other. Therefore, though a party has the decision of the board of property in his favor, he can not maintain trespass on such title till the determination of the ejectment instituted by the opposite party. *Shenberger v. Baker*, 14, 412

23. *Damages not recoverable while title undecided.* *Id.*

24. *Trespass by contractor against owner.*—A contract for the working of a mine, though not a lease, may give such exclusive possession of the mine as to enable the contractor to maintain trespass against the owner. *Shaw v. Wallace*, 14, 420

25. *Evidence in trespass against several defendants.*—Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *Aliter*, if a joint trespass has been proved. *McCarron v. O'Connell*, 14, 429

26. *No ouster is necessary to maintain trespass.*—Any unlawful entry is sufficient. *Rowe v. Bradley*, 14, 431

27. *An officer putting a receiver in possession of property of a party against whom he has no process, is a trespasser.* *Id.*

28. *Miners have no right to enter upon private lands*—the minerals have passed with the soil. *Henshaw v. Clark*, 14, 434

29. *A co-trespasser not joined as a defendant is a competent witness for the plaintiff*, to establish the trespass in an action for money had and received, in which the tort is waived. *Dundas v. Muhlenberg's Exrs.*, 14, 437

30. *Lessors held for tenant's trespass.* *Id.*

31. *Waiver of tort.*—In such case the plaintiffs may waive the tort and sustain an action for the value of the coal, as so much money had and received to their use. *Id.*

32. *When there are two ways of abating a nuisance the least mischievous should be chosen*; and the facts were held to justify such least mischievous course, although it had been initiated by trespass upon the land of a third party. *Roberts v. Rose*, 14, 441

33. *Trespass maintained by partner, not owner.*—Two persons entered into partnership for mining, the lease being to one, to whom all the stock, fixtures, capital and property belonged exclusively, both being in possession. A joint action of trespass by both for injury to the mines is maintainable. *Douty v. Bird*, 14, 454

TRESPASS. *Continued.*

84. *Trespass may be brought by person in possession or by owner.*
Yahoola River Co. v. Irby, 14, 460

85. *Corporations liable to trespass.*—A mining corporation carrying on the business of mining is liable for its torts. *Id.*

86. *Possession is essential in plaintiff,* to maintain trespass *quare clausum fregit.* *Huginin v. McCunniff,* 14, 468

87. *Vendor retaining other works on same vein.*—Defendant Huginin, with others, conveyed to Cushman the Elkhorn lode and gave possession under such conveyance of certain workings, retaining possession of a drift and other works under another claim. Afterward, developments proved that where Huginin had worked was on the Elkhorn vein which he had sold, but Huginin had not taken out ore except from the same works of which he had retained possession. *Held,* that plaintiffs, as vendees of Cushman, had no actual possession under which they could recover, and that they could not recover on the constructive possession arising out of their deed against the actual possession of defendants. *Id.*

88. *Trespass by plaintiff out of possession.*—Trespass can not be maintained where the plaintiff is actually dispossessed and the defendant in adverse possession of the land. *Raffetto v. Fiori,* 14, 469

89. *Burden of proof, when cast on defendant.*—Where ore has been taken by willful trespass from the plaintiff's ground, part before and part since the plaintiff became owner of the premises, the burden of proof is on the defendant to show how much was taken before the change of ownership; otherwise he will be held for the whole. *Little Pittsburg Co. v. Little Chief Co.,* 15, 655

40. *A principal is bound to know what his agent does* in the course of his employment, and the rule casting the burden of proof on defendant corporation to show what amount of the ore was taken before plaintiff purchased, will not be changed on account of the ore being taken by the superintendent without the knowledge of his company. *Id.*

41. *No favor to special pleading in trespass.* *Id.*

42. *Locator a trespasser after Land Office entry by adverse party.*
Omaha Co. v. Tabor, 16, 184

TRIAL.

1. *Doubtful questions should not be taken from the jury.* *Pence v. Langdon,* 13, 83

2. *Right to open and close.*—In trespass for taking ore, where the defendant admits the taking and seeks to justify it, and the only evidence necessary to make out a *prima facie* case for plaintiff is the production of his patent, and proof of the quantity and value of the ore taken, it is proper to allow the defendant to open and close. *Cheesman v. Hart,* 16, 268

TROVER.

1. *Trover for coal severed and sold by builder of railroad.* *Lyon v. Gormley,* 5, 883

2. *Measure of damages.*—The general principle is that damages in trover are to be assessed as of the time of conversion; in this case it was at the sale of the coal. *Id.*

TROVER. *Continued.*

3. *The finder of a jewel may maintain trover for conversion thereof by a wrongdoer.* *Armory v. Delamirie,* 10, 66

4. *Allegation of value material.*—The allegation of value in an action of trover is a material averment. If not denied it need not be proven. *Hixon v. Pixley,* 11, 555

5. *Time of conversion immaterial.* *Id.*

6. *Trover will not lie against party in adverse possession.* *Mather v. Trinity Church,* 14, 472

7. *Bond to pay for ore taken bars trover.* *Briggs Co. v. North Adams Co.,* 14, 483

8. *Possession of ore good against wrongdoer.* *Northam v. Bowden,* 14, 485

9. *Stone quarried by trespasser and attached to realty.*—The principal defendant quarried, dressed, sold and delivered to the trustee (garnishee) a quantity of granite and laid it down for a permanent walk on the trustee's premises. He obtained the stone without right, from the quarry of a third person, who, after the walk was laid, claimed them as his property: *Held,* that the property in the stone was in the trustee after they were laid into a walk, and that the trustee was indebted to the principal defendant, and liable as his trustee, at least, for the increased value of the stone, which was produced by their being quarried, dressed and delivered. *Jackson v. Walton,* 14, 488

10. *Trover lies for coal mined upon and carried away from the land of another by mistake.* *Forsyth v. Wells,* 14, 493

11. *Trover not maintainable without title in plaintiff.* *Castor v. McShaffery,* 14, 498

12. *Conversion by company refusing to issue stock.*—The refusal of a corporation on demand to transfer stock to an assignee of shares upon invalid grounds entitles such assignee to recover its value against the company. *Bond v. Mount Hope Co.,* 14, 500

13. *Trover for mining stock against assignees for benefit of creditors.*—Where a stock-broker failed and assigned his property for the benefit of creditors, but one of them, for whom he had purchased stock in certain companies, declined to accept the assignment and demanded stock in such companies then held by the assignees, and upon their refusal to deliver, brought trover as for a conversion: *Held,* that the fact that the assignees did not have sufficient of such stock to fill all the broker's contracts therefor could not be urged as a valid objection to a recovery. *Boylan v. Huguet,* 14, 508

14. *Brokers need not deliver identical stock purchased.* *Id.*

15. *The damages awarded in trover should be only such as necessarily arise from their wrongful act.* *Id.*

16. *Repeated conversion.*—In an action for conversion of stock, it is no defense that some other party took the property in the first instance. *Kuhn v. McAllister,* 14, 512

17. *Evidence of title in third party inadmissible.* *Omaha Co. v. Tabor,* 16, 184

TRUSTS.

1. *Equitable owners bound by the contracts and compromises of the holders of the legal title.* *Stonecipher v. Yellow Jacket Co.,* 3, 4

TRUSTS. *Continued.*

2. *Fiduciary purchasing at his own sale, after bidding off parcels sufficient to pay debt.*—Held, that the sale of such parcels in excess was void because as to such property the directors were the vendors and they could not purchase at a sale made by their own authority. *Harts v. Brown*, 4, 1

3. *Subrogation in such case.*—In such case where the receipts in excess of the debt secured, were used to pay off *bona fide* debts of the company, the parties paying such debts were entitled to be subrogated to the rights of the creditors paid, and such amounts allowed to them; but upon an accounting they should be charged with the full value of such parcels instead of the amount of the bids. *Id.*

4. *Cestui que trust—Notice to trustee.*—Where the trustee has no official relation to the transaction in controversy notice to him is not notice to the *cestui que trust*. *Chew v. Henrietta Co.*, 4, 69

5. *Trustee and cestui que trust.*—One who has secured a patent title by alleged fraudulent means, can not be adjudged a trustee of such title for another's use, unless the latter is entitled to a patent from the United States upon his equitable title. *Meyendorf v. Frohner*, 5, 560

6. *Resulting trust.*—There can only be a resulting trust where property is acquired and held in the name of one person, which, in equity, belongs to another, and this can not be true of property given to an individual for his own use. *Bragg v. Geddes*, 5, 625

7. *Ratification by cestui que trust.*—To establish a ratification by a *cestui que trust* it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also that the *cestui que trust* was fully apprised of the effect of the acts ratified, and of his legal rights in the matter. *Adair v. Brimmer*, 5, 682

8. *Variance—Cestui que trust suing as if he held the fee.*—Although the equitable owner may be entitled to have the waste of his land enjoined, such relief can not be granted in an action where he claims to hold the legal title and proves only an equitable estate. *Gillett v. Trenganza*, 7, 482

9. *Sale by trustee to innocent purchaser.*—If one of several partners in a mine holds the legal title in the same in his own right to the extent of his interest, and in trust for his copartners to the extent of their interests, a sale made by him, without the consent of his associates, of an undivided interest not exceeding in amount the interest held in his own right to one who has no notice of the trust, will convey only the title of the grantor, and not the interests of the *cestui que trust*. *Settembre v. Putnam*, 11, 425

10. *Purchase as trustee—Right to follow the fund.*—If one take unto himself a title which he has purchased with the money of another, he is a trustee for the true owner, who may rightfully follow the fund, wherever it may be miscarried. *First Nat. Bank v. Bissell*, 11, 547

11. *Prospector holding title in his own name for associates.*—If the legal title to a lode discovered and located in pursuance of a prospecting contract is taken in the name of two of the partners, equity will treat them as trustees for the other partner. *Hirbour v. Reeding*, 11, 514

TRUSTS. *Continued.*

12. *Purchaser with notice of trust.*—A purchaser of real estate, with notice that his grantor holds the title as trustee, stands in the place of the grantor, and is chargeable with the trust. *Stewart v. Chadwick*, 13, 287

13. *Descent of trust estates.*—Lands held in trust, upon the death of the trustee, descend to the eldest son, as at common law, and are not within the statute of descents. *Boston Co. v. Condit*, 14, 301

14. *Conveyance by trustee.*—When lands are held in trust by two, both the trustees must join to execute the trust. If one convey, the legal estate as to a moiety passes, subject to the trust. Whether both trustees must join in the same deed, *quære*. *Id.*

15. *Trustees not accountable* for following a losing adventure, if without fraud or negligence. *Wilkinson v. Stafford*, 14, 523

16. *Trustee using infant's name but not his funds.*—Trustee not answerable for having engaged the infant's name in an adventure if, afraid of the consequences, he does not engage the property. (*Contra*, *Morton Eden's* case in the House of Lords.) *Id.*

17. *Trustee can not buy or sell.* *Id.*

18. *No election allowed to trustee.* *Id.*

19. *Collusive recovery against trustee.*—The trustee of a mine can not be suffered to allow a collusive recovery in ejectment for the purpose of recovering a claim held by him against the mine. Such conduct is a breach of trust, and the plaintiff (who claimed adversely to the legal title held by the trustee) will be enjoined from suing out a writ of possession on his recovery. *Irwin v. Harris*, 14, 534

20. *All who participate in a breach of trust over concurring purchasers are jointly and severally liable.* *Barksdale v. Finney*, 14, 541

21. *Trust fund followed into company assets.* *Id.*

22. *A resulting trust may be defeated*, as well as established by parol evidence. *Bayles v. Baxter*, 14, 561

23. *Trustee bidding at his own sale—Bidding on tract with known reservation of minerals.*—Trustees of whom Chew, who was beneficially interested in the trust, was one, sold land to H., reserving minerals. H. paid part of the purchase money. Other trust lands had been sold with similar reservations. The court decreed a sale of the subjects of the trust remaining unsold, the trustees being allowed to bid. The trustees sold the lands and also the minerals reserved under the tracts previously sold. The tract sold to H. was exposed and bought in by Chew for less than the balance due by H. *Held*: 1. That Chew bought only the minerals which had been reserved in the agreement with H. 2. That Chew, as trustee, knew of the sale to H. and his payment on account. 3. That although permitted to bid he was bound to make a fair sale and act on his knowledge of the sale to H. *Cadwalader's Appeal*, 14, 565

24. *Knowledge of trustee presumed.*—A trustee is held to know of and be bound by what he has allowed to be done in his name, though acting by an attorney, and without personal supervision of details. *Id.*

25. *A trustee permitted to bid at his own sale must act within the strictest line of his responsibility.* *Id.*

TRUSTS. *Continued.*

26. *It is a breach of duty for a trustee to sell a claim at less than its known actual value. Id.*

27. *After-acquired title a trust estate for a grantee's benefit. Doyle v. Peerless Pet. Co.,* 14, 569

28. *Owner of mining stock bound by acts of trustee. Brewster v. Sime,* 14, 578

29. *Word "trustee" in stock not notice of secret owner's equities. Id.*

30. *"Trustee" of stock may sell or hypothecate it. Id.*

31. *One owner made trustee for all, "subject to such decisions as the parties may direct from time to time," gives him no right to sell the whole without the consent of all the owners; and a sale to a purchaser with notice can convey no more than his personal interest. Palmer v. Williams,* 14, 579

32. *Trustee bound by instructions.*—When authority in such case is given to the trustee to make sale on specified terms, he can not make it except in compliance with his instructions, and can not give credit where he is told to sell for cash. *Id.*

33. *Executors working mines in trust.*—A direction to executors to work and manage the coal under the lands of testator, and divide the profits among the children, creates an active trust. *Briggs v. Davis,* 14, 585

34. *Cestui que trust in possession holds against trustee's deed. Smith v. Lookabill,* 14, 588

35. *Informal transfer of equities.*—Deeds and proceedings showing value and *bona fides* may pass an equitable title though they might be insufficient to pass the legal title as such. *Id.*

36. *Resulting trust, how raised.*—A resulting trust in land can be raised only from fraud in obtaining the title thereto, or from the payment of purchase money when that title is acquired. *Bickel's Appeal,* 14, 591; *Bayles v. Baxter,* 14, 581

37. *Facts of the case stated and held insufficient to raise a trust. Bickel's Appeal,* 14, 591

38. *Trustee not liable for highest passing price, but for price actually received, if in good faith. Greenwood's Appeal,* 14, 608

39. *Idem—Basis of accounting.*—In the absence of fraud or bad faith in the sales, the true basis of accounting was the actual sales. *Id.*

40. *Agent giving note of trustee of special limited fund, can not by acts exceeding the limit, make his principals liable. Kahn v. Hamilton,* 14, 608

41. *A case of constructive trust must rest on fraud, either actually intended or resulting from a failure to recognize and observe the rules of business integrity. Pierce v. Pierce,* 15, 675

TUNNEL.

1. *The "line of the tunnel" does not necessarily mean the entire width and length of the surveyed tunnel site. The policy of the government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. Corning Tunnel Co. v. Pell,* 14, 612

2. *The "line" of the tunnel, having reference to the subject it was*

TUNNEL. *Continued.*

intended to describe, designates a width marked by the exterior lines or sides of the tunnel. *Id.*

3. *Tunnel contractor ousted under time clause by pretense of slow work.—Measure of recovery.* *McAndrews v. Tippet*, 14, 616

4. *Enjoining interference with tunnel.*—If, by the local customs, the owner of one mining claim has a right to construct a tunnel through an adjoining claim, in order to enable him to work his own claim, a court of equity may enjoin any interference with that right. *Bliss v. Kingdom*, 15, 239

5. *Failure to pay as the work progresses.*—When a party contracts to drive a tunnel and to receive his pay in agreed installments as the work progresses, on default of payment of any installment he may quit work and sue for the part completed. He is not bound to continue after the default. *Bennett v. Shaughnessy*, 16, 275

6. *Payments in this class of contracts* are conditions precedent, it being assumed that the contractor needs each installment to pay his outlays as he goes. *Id.*

ULTRA VIRES.

1. *Loan of money by water company not ultra vires.* *Union Co. v. Murphy's Flat Co.*, 3, 487

2. *Judicial conclusions from corporate name.*—No ultra vires after benefits received, against executed contract. *Bradley v. Ballard*, 3, 563

3. *Municipal and private corporations distinguished.* *Id.*

USAGE.

1. *Proof of usage to sell coal through brokers*, and that such brokers charged commissions, allowed. *Carter v. Philadelphia Co.* 2, 287

2. *The usages of a particular trade presumed to be known to those engaged therein.* *Id.*

3. *A usage among brokers to buy on shorter time than ordered and carry the same until the maturity of the contract and to charge brokerage for so doing*, can not be supported. *Day v. Holmes*, 2, 276

4. *Usage aids construction.*—An ancient grant is to be construed by evidence of the manner in which the thing granted has always been possessed and used. Even if the right to mine were doubtful, it seems it might be implied from long continued acquiescence. *Griffin v. Fellows*, 8, 658

5. *Destructive usage.*—A claim destructive of the subject of the grant can not be set up by any usage. *Horner v. Watson*, 14, 1

VARIANCE.

1. *If the plaintiff has not declared for money paid to the use of the defendant*, he can not have an action therefor. *Murley v. Ennis*, 12, 360

2. *Judgment not following prayer.* *Dousman v. Wisconsin Co.*, 13, 573

3. *A discrepancy in figures* in a complaint stating a good cause of action will not be reached by general demurrer. *State v. Northern Belle Co.*, 14, 211

See PLEADING AND PRACTICE.

VENDOR AND PURCHASER.

1. *Tender of insufficient title.*—Where there is an agreement for the sale of an interest in land and the vendor (or lessor) refuses to execute an instrument completing it, but insists upon tendering an inferior or lesser estate, the contract may be regarded as broken and the purchaser may sue for the consideration advanced with interest. *Reddington v. Henry*, 8, 81

2. *Title of vendee can not be greater than that of the vendor at time of sale.* *Waring v. Crow*, 5, 204

3. *Iron furnace and ore contract—Construction, whether sale or license.*—*Clement v. Youngman*, 5, 280

4. *Acquiescence in default of vendee.*—*Held*, that having allowed the contract to subsist after default, the vendor could not put an end to it without formal and reasonable notice to the vendee to come forward and fulfill. *Falls v. Carpenter*, 6, 397

5. *Purchase by third party, in interim.*—Such purchaser may, upon tender before notice as aforesaid, demand specific performance from the vendor or call for the legal title from a third party purchasing with full knowledge of the contract. *Id.*

6. *Purchaser subrogated to rights of vendor.*—Where property of which a defective lease has been granted is subsequently sold, the purchaser takes the property subject to the burden of any delay of which the vendor may have been guilty; and in reference to a defense founded on laches, the purchaser can stand in no better position than the vendor would have done if he had never parted with the property. *Ernest v. Vivian*, 8, 205

7. *The bona fide purchaser of a legal title is not affected by any latent equity of which he has no notice, actual or constructive.* *Brophy Co. v. Brophy Co.*, 10, 602

8. *Payment of purchase money before notice of outstanding equities.*—A mining claim was purchased for one thousand dollars in coin, and fifteen thousand shares of stock in a corporation thereafter to be formed. The money was paid, but only a portion of the certificates for shares of stock was delivered to the grantor before the purchaser received notice of the equities of plaintiff: *Held*, that the purchase money was paid before notice. *Id.*

9. *Maxim "sic utere, etc.," applied.*—Without a contract or some relation of privity as to the use to be made of land sold, the vendee stands to his vendor just as he does to others, and the maxim applies, *sic utere tuo ut alienum non laedus*. *Brown v. Torrence*. 10, 692

10. *Prior deed not conclusive of title.* *Fair v. Stevenot*, 11, 11

11. *Agreement to purchase gives no right of property.*—The consummation of purchase alone does this. *First Nat. Bank v. Bissell*, 11, 546

12. *Innocent purchaser without notice.*—The defense that a defendant is an innocent purchaser for valuable consideration without notice, may be set up either by plea or by answer. The distinction stated between answer and plea in such case. *Carter v. Hoke*, 12, 579; *Ernest v. Vivian*, 8, 205

VENDOR AND PURCHASER. *Continued.*

13. *Idem*—*Burden of proof*.—Upon such defense, after defendant proves the consideration paid, the plaintiff must show, if he can, that there was notice. *Carter v. Hoke*, 12, 579

14. *Purchaser with notice of settlement*.—An agreement having been made with the express intention of settling prior disputes, a party can not go behind it, and those taking under such party with notice of the contract take subject to it. *Stewart v. Chadwick*, 13, 237

15. *Defaulting co-purchaser*. *Willis v. Forney*, 14, 389

16. *Purchaser in possession, taking profits*.—Order on purchaser, before conveyance, pending bill for specific performance, to pay into court installments due on account of the subject of contract, being a coal mine, and the purchaser in possession and working it. *Buck v. Lodge*, 14, 623

17. *Equitable defense to purchase money*.—Defense upon equitable grounds may be taken to an action for purchase money, even at common law. *Fisher v. Worrall*, 14, 624

18. *Undisclosed knowledge by purchaser of mineral value, no fraud*. *Harris v. Tyson*, 14, 634; *Caples v. Steel*, 15, 1

19. *Idem*.—Even if that knowledge is of a mine entirely unknown to vendor. *Caples v. Steel*, 15, 1

20. *Contra, if he make false statements*.—If the vendee, during the negotiation for the purchase, had willfully made any misstatements of a material fact, and thus misled the vendor and induced him to sell at a lower price than he otherwise would, the contract would have been a cheat, and the conveyance void. *Caples v. Steele*, 15, 1; *Harris v. Tyson*, 14, 634

21. *Possession of employe no notice*.—The possession of an employe is that of his employer, and does not operate to give notice of his equities. *Jenkins v. Redding*, 14, 647

22. *Pretense of outstanding title*.—Where one of the plaintiffs sold to defendants a certain quartz lode, in which he in fact owned no more than four-sevenths, but the defendants knew this when they purchased and bought in the outstanding interest for little or nothing, having treated them at the outstart as abandoned: *Held*, that they could not set up outstanding title to defeat specific performances. *Hitchens v. Nouyues*, 14, 649

23. *After-acquired title*.—Where defendants bought a quartz lode and as consideration granted to the wife of the vendor one third interest in the land, and afterward bought in an outstanding title known to exist at the time of the contract for little or no consideration: *Held*, that their subsequent purchase inured to the benefit of the vendee, the wife of the original vendor. *Id.*

24. *Evidence of payment out of stock proceeds allowed*. *Hoereler v. Mugèle*, 14, 654

25. *Reservation of minerals constitutes defect in title*—*Prospect of litigation a ground to resist specific performance*. *Mawson v. Fletcher*, 14, 657

26. *Optional contracts of sale*—*Intermediate buyer entitled to advance in price*. *Logan v. Dils*, 14, 653

VENDOR AND PURCHASER. *Continued.*

27. *Situation of contracting parties.*—In construing a contract and for the purpose of getting at the intention of the parties, their situation and all the circumstances surrounding the transaction may be considered. *Corbett v. Berryhill*, 14, 671

28. *The vendee is not bound to take an imperfect title*; he can not be driven to assume risks and rely on the covenants in the deed for his remedy. *Marsh v. Holley*, 14, 687

29. *Where the consideration money is not paid or tendered*, a vendee can not recover upon a covenant to convey. *Id.*

30. *Remedy for breach of contract of purchase.*—Where A held title to realty in trust for B, and at B's request conveyed to C, the payment of the purchase money being a condition precedent to the delivery of the deed, and the deed, having been delivered without compliance with that condition: *Held*, that on refusal of payment B had his election either to pursue his remedy at law against C, and thus affirm the contract, or to rescind the contract and seek equitable relief. *Hamill v. Thompson*, 14, 696

31. *Vendee examining for himself*, and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser can not afterward allege that the vendor made false representations respecting the subject investigated. *Southern Development Co. v. Silva*, 15, 485

32. *Option and mutuality.*—In an action on a contract, want of mutuality can not be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right. *Waterman v. Waterman*, 15, 687

33. *Question of sale or security.*—Evidence considered, and held to not sustain the position that the contract to convey was given simply as security for the money advanced. *Id.*

34. *Meaning of "dispose" and "sell."*—When a contract respecting property contains an agreement to be performed by the owner of it when he shall "dispose of or sell it," it is obvious that the words "dispose of" are not synonymous with the word "sell," and their meaning must be determined by considering the remainder of the contract. *Hill v. Sumner*, 16, 281

35. *Letting is a disposing of the property.* *Id.*

36. *Facts of the case.*—*Construction of the contract.* *Id.*

VENDOR'S LIEN.

1. *Vendor's lien not transferable.*—The equitable lien held by the vendor of real estate, after absolute conveyance thereof, is not subject to levy and sale on execution, nor is it the subject of private transfer. *Ross v. Heintzen*, 12, 483

2. *Idem.*—*The purchase money attachable.* *Id.*

3. *Bonds tendered as security for purchase money of land and refused.*—Ahl sold land to the company; as part of the consideration he was to receive bonds, secured by a second mortgage. He delivered the deed; judgments were confessed by the company, after which the mortgage was executed. The bonds were tendered to Ahl; he refused

VENDOR'S LIEN. *Continued.*

them because of the judgments; the bonds were then otherwise appropriated by the company. *Held*: 1. That the setting apart of the bonds to Ahl gave him no claim for their amount, in the distribution. 2. That in the distribution, it was a question of lien, and Ahl had no lien. After his rejection of the bonds he had no further claim on them; the company could dispose of them as they pleased. He had only a right of action against the company for the purchase money.

Ahl's Appeal,

3, 638

4. *Vendor's lien for price of mineral in ground sold.*—Where the owner of land, by deed, bargains, sells and conveys to another, his heirs and assigns, all the coal, limestone, iron ore, rock oil and other mineral in, upon or under the land, with an express license to the grantee, his heirs and assigns and laborers, to enter and search for said minerals and to dig, mine, explore and occupy with the necessary structures, etc., and to mine and remove the coal, etc., for which grant the purchaser agrees to pay to the grantor a stipulated price per ton for the various minerals removed, payable quarterly, the grantor will have a vendor's lien on the coal and mineral not mined and removed, for the purchase money, which he may enforce by a sale of the coal and mineral not taken from the ground. *Manning v. Frazier*, 8, 307

5. *Same—Waiver of lien—Its extent.*—If a deed conveying coal and other mineral in the ground on a credit, to be paid for quarterly, as the same are mined and removed, authorizes the sale of the coal, etc., before payment is to be made, that will only be a waiver of the vendor's lien *pro tanto* for what is thus removed, but not for the coal, etc., still in the mine. *Id.*

VENTILATION.

1. *Ventilation.*—Method of, described. *Lehigh Valley Co. v. Jones*, 10, 30

2. *Working as affected by the safety statutes.*—The court ought not to enforce a working that disregards the statutes relating to ventilation and the safety of the deep miners. *Abinger v. Ashton*, 6, 1

8. *Safe working of colliery—Construction of the British Statute—Air must go to the headings.* *Brough v. Homfray*, 15, 6

4. *Two outlets.*—The act requires two outlets, at least 150 feet apart, at every place where coal mining is carried on, but it does not require these two outlets to belong to the same mine. *Com. v. Bonnell*, 15, 14; *Com. v. Wilkesbarre*, 15, 31

5. *Constitutionality of Ventilation Act.*—The coal mine ventilation law, act of March 8, 1871, is constitutional, and the court will enforce strict compliance with all its provisions. *Com. v. Bonnell*, 15, 14

6. *Abuse of the act.*—The proviso to the third section does not authorize the production of coal for market, under the pretext of "making another opening through coal." *Id.*

7. *Distant heading reached by incline from old workings.*—Though the old workings have two outlets, if the new is connected with the old by but one, it is without sanction of law, and may be restrained. *Com. v. Wilkesbarre*, 15, 31

8. *Liability of manager for insufficient ventilation.* *Hall v. Hopwood*, 15, 49

VERDICT.

1. *Presumption in favor of verdict on motion for a new trial* must be drawn from all inferences that the jury might without error have made. Other inferences are to be discarded. *Kimmins v. Wilson*, 2, 159
2. *Verdict, how recorded.*—A verdict for \$2,500 actual damages and \$2,500 smart money should be recorded as rendered and not as an entire verdict for \$5,000. *Moody v. McDonald*, 2, 187
3. *Entitling verdict.*—It is not necessary that a verdict should be entitled. *McGarrity v. Byington*, 2, 311
4. *Referee's report equivalent to verdict.*—The report of a referee is entitled to the same weight as the verdict of a jury upon the facts of the case. *Fitch v. Archibald*, 2, 555
5. *Distinct defenses.*—If a general verdict is found for the defendants in a suit in which there are several distinct defenses, the verdict will be allowed to stand if it be right as to one, though wrong as to all the others. *Kidd v. Laird*, 4, 578
6. *Conclusiveness of verdict.*—A verdict found on any fact or title, distinctly put in issue, is conclusive in another action between the same parties or their privies in respect of the same fact or title. It is not sufficient that the particular fact or title is put in issue. It must be tried by the jury, and constitute the basis and foundation of the verdict. *Id.*
7. *General verdict.*—A general verdict is limited in its effect to such issues as necessarily controlled the action of the jury. *Id.*
8. *Verdict set aside—Want of diligence.*—Due diligence is a question for the jury, but the term is sufficiently well defined to justify a court in setting the verdict aside, when, upon an admitted state of facts, there appears an utter want of diligence. *Ophir Mining Co. v. Carpenter*, 4, 640
9. *Duty of the court to direct verdict for defendant.*—Where the plaintiff shows upon the trial no cause of action, or makes out no case whatever, and no motion for nonsuit is interposed, it is not only the right, but may be the duty of the court to direct a verdict for the defendant. This practice is common to both the code and the common law. *Murphy v. Cobb*, 5, 880
10. *Jury finding in equity case.*—The verdict of a jury in equitable actions is but advisory; the court of appeal reviews the whole evidence, and the instructions to the jury are immaterial. *Law v. Grant*, 7, 57; *Clegg v. Jones*, 7, 572
11. *Verdict is not disturbed when evidence conflicting*, if the judge and jury may be fairly presumed to have concurred in support of the verdict. *Antoine Co. v. Ridge Co.*, 10, 97; *Caruthers v. Pemberton*, 4, 628; *Chicago R. R. v. Illinois Co.*, 15, 198; *McGarrity v. Byington*, 2, 311
12. *Although the preponderance of evidence is against the verdict*, yet it will not be disturbed if there is some evidence to support it. *Lincoln v. Rodgers*, 14, 79; *Wilson v. Fitch*, 9, 155
13. *Supervision exercised over special verdicts.*—It is the province of the court to determine as to what facts the jury shall find specially

VERDICT. *Continued.*

and neither party has the right to dictate the terms of any particular question to be submitted to the jury. *American Co. v. Bradford*, 15, 190

14. *General, corrected by special verdict.*—The fact that in an equity case the jury are allowed to return a general verdict is harmless error, where they also return special findings for the same party, which are accepted by the court, and on which judgment is rendered. *McCauley v. McKeig*, 16, 1

15. *When an equity case is tried as an action at law*, by calling a jury and examining witnesses before them, their verdict will be treated the same as if it were a finding by the court. It is not reversible practice and the only errors to be considered are such, if any, as exist in the reception of evidence or in the charge. *Hammer v. Garfield Co.*, 16, 125

VESTED ESTATE.

1. *Statute null to divest prior vested rights.*—The act of 1868, attempting to change trust estates held in common to joint tenancies, can not operate upon past estates, although it was intended to be retroactive. *Boston Co. v. Condit*, 14, 301

VOID AND VOIDABLE.

1. *A contract induced by fraud is not void*, but voidable upon knowledge and election. *Davis v. Henry*, 6, 680

WAGES.

1. *Wages are the reward of labor* and always come of contract, express or implied. *Penn. Coal Co. v. Costello*, 15, 47

2. *Wages of skilled miners.*—Wages earned by the personal manual labor of the debtor are exempt from attachment, although his superior skill and care as a miner may entitle him to a greater compensation than the common laborer. *Id.*

3. *Facts of the case—Breastmen and laborers in coal mining.*—Two miners are employed in a chamber; these employ one laborer between them. The money is paid to one or both the miners, who pay the laborer at a certain rate, or he may give notice and draw his own pay direct from the operator. *Held*, that the fact of the employment of this third party, as a laborer under them, did not deprive the money coming to them of the character of wages of labor, under the act exempting such wages from attachment. *Id.*

4. *Insufficient answer, denying the note sued on, but not the labor for which it was given.* *Risto v. Harris*, 15, 53

5. *Condition in rules allowing miner to leave without notice.*—Under a contract providing that "any employe wishing in good faith to leave," may do so without notice, may do so whether there is good cause or not. *Wilmington Coal Co. v. Lamb*, 15, 56

6. *Damage can not accrue where special contract allows of the act complained of.* *Id.*

7. *Money payment Act.*—A law prohibiting corporations from paying their employes in anything but money is a valid exercise of legislative power. *Shaffer v. Union M. Co.*, 15, 59

WAGES. Continued.

8. *Validity of orders drawn against wages.*—The act entitled, "An act to prohibit the payment of employes of certain corporations operating in Allegheny county, otherwise than in legal tender money of the United States," is constitutional, so far as it affects the corporations named, but it can not restrict the employes from drawing orders on the corporation for wages due, in favor of merchants with whom the employes may have run accounts; and such orders being accepted by the corporations, constitute a valid assignment of the wages. *Id.*

WAIVER.

1. *Waiver of exceptions.*—When an amended declaration is withdrawn, so is a bill of exceptions to evidence offered under it. *Lyon v. Miller*, 10, 85

2. *Waiver of part of relief asked for in equity.*—If, in an action brought against two of several mining partners to establish the plaintiff's right to an interest under a contract with the defendants, and for a conveyance with account and dissolution, the plaintiff is content with a judgment establishing his right and directing a conveyance, waiving account and dissolution, the court may grant that relief and give judgment, without making the other partners parties defendant. *Settembre v. Putnam*, 11, 425

See PLEADING AND PRACTICE.

WARRANTY.

1. *Quality.*—A mere statement in a bill is not a warranty of quality; to make a warranty, such expressions must be used as to show an intention of the party to bind himself by the representations made. *Carondelet Iron Works v. Moore*, 2, 635

2. *A general warranty is a real covenant descending with the land, and passing by its express terms.* *Susquehanna Co. v. Quick*, 1, 202

3. *Measure of damages—Gold dust.*—The measure of damages against grantors warranting the title to a ditch and water: *Held*, to be the value at the time of the conveyance, with interest, costs, etc., without regard to the known use which grantees intended to make of the water. *Held*, further, that the consideration in the deed being \$2,000 in clean gold dust, only \$3,000 in currency could be collected for such consideration. *Taylor v. Holter*, 3, 322

4. *Warranty in deed of release.*—A deed in which the grantor remised, released and quit-claimed all that certain water-right lying, etc., as distinguished from the interest of the grantor in the water-right, followed by a covenant of general warranty: *Held*, to be a bargain and sale when supported by a full consideration, and that the grantor had warranted the title. *Id.*

5. *Liability of trustees for personal warranty of title.*—The grantors in a warranty deed, who held the title as trustees for a third party, to whom the consideration was paid, are liable on their personal covenants in the deed, though they were under no obligation to make a personal covenant of warranty. *Id.*

6. *Trustee, the proper plaintiff in a suit on warranty.* *Hartford Co. v. Miller*, 3, 853

7. *Personal liability where title fails to pass.*—*Held*, that the articles did not prevail against a deed to a stranger, though the maker

WARRANTY. *Continued.*

was personally liable on the articles to make good his privilege.
Snodgrass v. Ward, 4, 306

8. *A warranty may be implied when our sense of justice requires it, and it is essential to complete the definition of the relation intended to be established between the parties, but its terms must be clearly deducible from the instrument and from the nature of the transaction.*

Harlan v. Lehigh Coal Co., 8, 496

9. *Warranty not implied on sale of mining claim—Title lost by vendee failing to represent.* *Corbett v. Berryhill*, 14, 671

10. *Either knowledge or warranty by defendant must be averred by plaintiff.* *Chandelor v. Lopus*, 15, 70

11. *Warranty runs with the land.* *Blackwell v. Atkinson*, 15, 71

12. *Warranty of stock no warranty against corporate debts.*
Williams v. Hanna, 15, 73

13. *In an action on a covenant against incumbrances it is not necessary to aver or prove an eviction.* *Stambaugh v. Smith*, 15, 83

14. *Covenant of seizin.*—In an action upon the special covenant of seizin in a deed, a breach is not sufficiently shown by an averment negating the legal seizin of the covenantor at the time the covenant was made, but his seizin in fact must also be negated. *Id.*

15. *Covenant against incumbrances.*—A covenant against incumbrances is broken as soon as made, if an incumbrance in fact exists; but in an action for breach thereof only nominal damages can be recovered unless it be shown that the covenantee has removed the incumbrance or has been disturbed in his possession. *Id.*

16. *Warranty of quality by comparison—Mistake.*—To say that coal sold shall be "of good and of as good quality as" certain coal being landed "at the mills of Havens," in the same city, is a warranty of the good quality of the coal, even though it appears that there are no such mills. *Pearson v. Martin*, 15, 95

17. *Express warranty.*—Where there is an express warranty, there is no room for implications. *McGraw v. Fletcher*, 15, 98

18. *"Complete in everything for working."*—Held, no warranty of what the machine could do, but only an agreement that it should be delivered fully equipped. *Id.*

19. *Drilling machine bought for prospecting purposes.*—Plaintiff knew that he intended to prospect for minerals with it, and stated that the machine had been used for that purpose, but both parties knew that the machine had not been constructed for this species of work and that its merits in that regard had not really been tested: the machine was to be delivered "complete in everything for working:" Held, that there was no warranty, express or implied, that the machine was adapted to the use of prospecting. *Id.*

20. *Sale of "all interest" of vendor, no implied warranty.*
Johnston v. Mendenhall, 15, 101

21. *Where a sale is limited in terms to such interest as the vendor has, without warranty, the transaction being free from fraud or concealment, a defect in the vendor's title can not defeat a suit for purchase money.* *Id.*

WARRANTY. *Continued.*

22. *The rule in regard to warranty on sale of leasehold interests, such as are required to be transferred by deed, is the same as in cases of real estate. Id.*

WASTE.

1. *Waste.*—Making of new mines is waste unless the lease is of all mines on the land. *Owings v. Emery*, 8, 387

2. *Right of tenant for life to mine coal.*—Prior to the beginning of a life estate in certain coal lands, coal had been taken and used for domestic purposes from an opening where the coal out-cropped, but it had never been mined for market. *Held*, that the tenant for life could not mine the coal for sale, but only for the purpose for which it had previously been mined. *Franklin Co. v. McMillan*, 10, 224

3. *Tenant for life may exhaust open mines*, when not precluded by restraining words. *Westmoreland Co.'s Appeal*, 10, 394; *Irwin v. Covode*, 15, 120

4. *It is not waste to properly work a quarry.* *Vervalen v. Older*, 10, 540

5. *Unlimited use, including timber.*—Devise of salt works, for life, remainder over, construed to allow the devisee to make unlimited use of the salt works, saline water, and the wood land supplying them with fuel. *Findlay v. Smith*, 13, 182

6. *Circumstances of new country.*—The law of waste must be accommodated to the circumstances of a new and unsettled country. *Id.*

7. *Open mines.*—It is not waste in a tenant for life or years to work mines or quarries already opened. *Coleman's Appeal*, 14, 222; *Irwin v. Covode*, 15, 120

8. *Waste by co-tenant*, through gross negligence, renders him liable to his co-tenants, but he can not be held responsible unless the bill charges such waste. *Graham v. Pierce*, 14, 308

9. *Waste against executors.*—If lessee devise his term and die, and then his executors do waste, and afterward assent to the devise, an action of waste in the *tenuit* lies against the executors. *Saunders' Case*, 15, 109

10. *Threats to commit waste—Injunction.*—The court of chancery has jurisdiction to stay waste in opening mines where the defendant has threatened to open them and insists upon his right so to do. *Gibson v. Smith*, 15, 111

11. *Tenant in dower may work underlying seams.* *Crouch v. Puryear*, 15, 113

12. *Reasonable and necessary use.*—The statutes of Pennsylvania in relation to waste. *Irwin v. Covode*, 15, 120

13. *Waste not presumed.* *Lynn's App.*, 15, 126

14. *Tenant for life committing waste.*—When a tenant for life impeachable for waste, improperly, knowingly and wilfully commits waste, he can not derive any benefit from the timber cut. *Bagot v. Bagot*, 15, 180

15. *Waste, no subject of mandamus.*—If one who is entitled to an order to stay waste does not seek it in an affirmative suit at law, or in equity, he has no remedy for its refusal. *People v. The Circuit Judge*, 15, 142

WASTE. *Continued.*

16. *Presumptions as to authority for working the quarry.*—Where it is proved that a quarry was worked, and that there was a lease which would authorize the workings, it will be presumed that the workings took place under the lease. *Elias v. Snowdon Slate Co.*, 15, 143

17. *What is a sufficient opening of a quarry*, considered on the facts of the case. *Id.*

18. *If a mine has been worked for commercial profit*, that is ordinarily decisive proof of the right to continue working; taking minerals for some restricted purpose would not give such right. *Id.*

19. *Cesser of work distinguished from abandonment.*—Mere cessation of work, though never so long continued, will not defeat the tenant's right to work; but an abandonment for a day with an executed intention to devote the land to other uses would be fatal to the claim of the right to work on behalf of the tenant for life. *Gaines v. Green Pond M. Co.*, 15, 153

20. *New pits may be sunk upon veins already opened.* *Id.*

WATER.

1. *The appropriation of water for all purposes stands upon equal footing*, and a later appropriation for mining purposes is not good against a prior appropriation by a mill. *McDonald v. Bear River Co.*, 1, 626

2. *Damage for diversion.*—A verdict for damages in an action at law for diversion of water, does not establish the quantity of water to which the plaintiffs are entitled, nor is it to be presumed that the whole number of inches claimed in their complaint was proved to and found by the jury; and the averment of such former recovery is not of itself sufficient to support an injunction against further diversion. *McDonald v. Bear River Co.*, 1, 639

3. *What will constitute invasion of water rights* of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is, whether his use and enjoyment of the water, to the extent of the original appropriation, have been impaired by the acts of the other parties. *Atchison v. Peterson*, 1, 583

4. *Sale—Previous right of action.*—The conveyance of a water claim does not transfer the right of action for damages for the past illegal use of the water. *Kimball v. Gearhart*, 1, 615

5. *Water returned.*—Where water is taken at a point above the plaintiff's ditch, and after being used, is returned so that it reaches plaintiff's ditch without material diminution in quantity or quality, plaintiff has no cause of action. *Yankee Jim's Co. v. Crary*, 1, 196

6. *Division of water may be by quantity or by alternate use.*—The principle is the same. *Smith v. O'Hara*, 1, 671

7. *Water rights excluded in patent.*—Where patent issues reserving the water rights mentioned in § 2389, U. S. Revised Statutes, the claimant of such rights continues to own them; but his right may become divested by abandonment. *Dodge v. Marden*, 1, 63

8. *Servitude.*—Purchaser of ditch partially constructed takes sub-

WATER. Continued.

ject to servitude contracted by grantor. *Highland Co. v. Mumford*,
2, 8

9. *Distribution of water among colonists*, and mode of measurement of water stated, in the agreed case and in the opinion of Beck, J., which was affirmed. *Id.*

10. *Diversion of water.*—*Held*, that the appropriation by defendants in 1865 below the site of the plaintiff's mill did not justify the diversion above the mill in 1869. *Columbia Co. v. Holter*, 2, 14

11. *Detention must be exercised with reference to rights of lower proprietors.* *Oregon Iron Co. v. Trullenger*, 4, 247

12. *Surplus water—Rights of subsequent appropriators.*—Subsequent locators may appropriate the surplus waters of a stream left after a prior appropriation, and when the rights of such subsequent appropriators once attach, the prior appropriator can not encroach upon them by extending his appropriation; nor can he enlarge his ditch or dam so as to retain what he originally appropriated, if, through intervening accidents (as the filling of the stream-bed with tailings), such enlargement would interfere with such intervening rights. *Nevada Water Co. v. Powell*, 4, 254

13. *Necessity of water.*—The loss of its water may be equivalent to the destruction of all value to the claim. *Jennison v. Kirk*, 4, 505

14. *Diminution of water supply.*—The first appropriator of water by means of a ditch is entitled to have the water flow, without material interruption, in its natural channel, so undiminished in quantity as to leave sufficient to fill his ditch as it existed at the time the latter locations were made above. *Bear River Co. v. New York Co.*, 4, 526

15. *Deterioration in quality of water.*—The deterioration in the quality of water in the ditch by means of its use for mining purposes above, should be considered as an injury without consequent damages. *Id.*

16. *Reclamation after flowing back into natural stream.*—*Mingling waters.*—The rights of the parties after such mingling are not unlike the rights of the owners of goods of equal value after their mixture; both are entitled to take their given quantity. *Butte Canal Co. v. Vaughn*, 4, 552

17. *Rights to running water.*—Running water, so long as it continues to flow in its natural course, can not be made the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but this right carries with it no specific property in the water itself. *Kidd v. Laird*, 4, 571

18. *Property or right.*—The owner of a ditch has exclusive and absolute power of control over and right of enjoyment in the water running in his ditch, whether the water is or is not, in a strict legal sense, his private property. *Id.*

19. *Illegal diversion of water prevented by use of force* in ejecting the interlopers. *Butte Co. v. Morgan*, 4, 583

20. *Common law controlled by conditions.*—The reasons which constitute the groundwork of the common law upon the subject of water

WATER. *Continued.*

rights, remain undisturbed. The conditions to which courts are called upon to apply them are changed, and not the rules themselves. The maxim *sic utere tuo ut alienum non lædas*, has lost none of its governing force. *Hill v. Smith*, 4, 597

21. *Maxims* controlling the relative rights of miners and ditch owners and of prior and later appropriators. *Id.*

22. *Test of injury to water rights.*—The question is, has the enjoyment of the water for the purpose for which the first appropriator claims it, been impaired by the acts of the subsequent claimant. *Id.*

23. *Water turned into stream by strangers* without any intention of recapture by them, such increase becomes *publici juris*, and the relative rights of appropriators along the stream remain the same as before. The case is not different from an increase from natural causes. *Davis v. Gale*, 4, 605

24. *Rights by adverse possession, when not prejudiced.*—One who has adverse possession of water, as against the prior appropriator, does not prejudice his right by the fact that he allows a certain quantity of water to run down to miners at work below. Such an act is no concession to the prior appropriator. *Id.*

25. *Relief in equity for disputed water rights.*—When two parties each claim the prior right to the use of water, equity seems to be the only appropriate remedy. *Barkley v. Tieleke*, 4, 666

26. *Damages for diverting water—Contributory negligence.*—It is no defense to an action for damages for diverting three-fourths of the water the plaintiff is entitled to, that he has allowed a portion of the remaining fourth to run to waste. The doctrine of contributory negligence has no application to such a case. *Barnes v. Sabron*, 4, 675

27. *Nominal damages—Decree fixing amount of water party is entitled to.*—Defendant diverted water from plaintiff's crops, claiming to have the better right thereto. *Held*, that though plaintiff suffered no actual damage, yet the diversion might by lapse of time ripen into a prescriptive right, and for this reason plaintiff was entitled to recover nominal damages, and to an equitable decree declaring the amount of water to which he was entitled. *Id.*

28. *Relation of water to mining.*—Review of the enlarged use of water by progress in the processes of mining for placer deposits, with the history of the recognition of its necessity by the action of the miners, by the local courts and by congressional action. *Titcomb v. Kirk*, 5, 10

29. *Water rights of miners.*—Each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will naturally and necessarily result in injury to others, it will be *damnum absque injuria*. *Esmond v. Chew*, 5, 175

30. *Reasonable use of stream, a question for jury.* *Pool v. Lewis*, 5, 523

31. *Right to convey water over another's land.*—In Colorado lands are held in subordination to the dominant right of others, who must

WATER. *Continued.*

necessarily pass over them to obtain a supply of water to irrigate their own lands; but whether this right rests in grant, or upon the statute, or in the necessities of a dry climate, diverse opinions are expressed by the several judges. *Yunker v. Nichols*, 8, 64

89. *Government title to streams in public land.*—Before title to public lands is acquired from the government of the United States, no occupancy or appropriation of the water flowing through the same, nor State legislation, nor decision of State courts, can in any manner qualify, limit, restrict or affect the operation of the government patent. *Union M. Co. v. Ferris*, 8, 90

88. *Presumptive grant of water-rights.*—If the owner of a tract of land for which he holds patents from the government, through which land a stream of water flows, has, by reason of the adverse possession and use of the stream by an upper proprietor, presumptively granted to the latter the use of the stream for purposes of irrigation, such grant does not affect lands on the same stream acquired by the lower proprietor after such presumptive grant had its origin. *Id.*

84. *Use of water, when adverse.*—The use of water by a riparian proprietor is not adverse unless it appears that its use causes such injury to another as would justify an action for its redress. *Id.*

85. *Use of water by riparian proprietor.*—A riparian proprietor may make a reasonable use of the water of a stream for purposes of irrigation, but before he can acquire a right to the water by adverse use or prescription, the burden is on him to show that his use has amounted to an actionable invasion of the right of another. *Id.*

86. *Unreasonable use of water.*—A use of water which is unreasonable is such as works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other proprietor. *Union M. Co. v. Dangberg*, 8, 113

87. *Necessary use of water for domestic purposes, etc.,* is allowed to every proprietor in the exercise of the common right. *Id.*

86. *Sufficiency of complaint for diversion of water considered.* *Leigh Co. v. Independent Co.*, 12, 97; *Priest v. Union Canal Co.*, 4, 515

89. *No right to reclaim escaped water.* *Eddy v. Simpson*, 15, 175

40. *Usufruct in water.*—The right to water is usufructuary; it is not in the corpus of the water, and continues only during possession. *Id.*

41. *The right to divert water from its natural streams* has been recognized by the State legislation of California, and by the tacit assent of the Federal Government. *Irwin v. Phillips*, 15, 178

42. *Rights of prior appropriator of water.*—The prior appropriator of a stream of water for mining purposes has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity. *Phoenix W. Co. v. Fletcher*, 15, 185

43. *Failure to plead adverse use of water* by the party claiming a right to the use of water by adverse possession forfeits for him the

WATER. Continued.

right to introduce evidence in support of it, and to have the court instruct the jury in relation to it. *American Co. v. Bradford*, 15, 191

44. *Enjoined diverter may tap below. Id.*

45. *The intended user of the water by one who diverts it is not material. Van Sickle v. Haines*, 15, 201

46. *Miners' inch treated as uncertain measurement in verdict. Dougherty v. Haggin*, 15, 211

47. *Damages from percolating water are an injury for which no redress can be granted. Lord v. Carbon Iron Co.*, 15, 696

48. *Change of use or point of diversion.*—One who has acquired the right to divert the waters of a stream may change the point of diversion and place of use without losing his right of priority, where the rights of others are not injuriously affected. *Fuller v. Swan River Co.* 16, 252; *Kidd v. Laird*, 4, 571; *Butte Co. v. Morgan*, 4, 533

See DITCH, DRAINAGE, IRRIGATION, RIPARIAN RIGHTS, SPRINGS.

WATER-COURSE.

1. *Artificial water-course—User.*—In the case of an artificial water-course, made for a particular and temporary purpose, its water having been originally taken with notice that it might be discontinued, and the circumstances not being such as to afford any presumption of a grant by the owners of certain mines, the lessee of the owner of the land through which the water-course was made was held not to have acquired by user any perpetual right to its uninterrupted continuance. *Arkwright v. Gell*, 15, 163

2. *A sinking stream may be and have the legal rights of a natural water-course. Barnes v. Sabron*, 4, 674

3. *Underground currents not water-courses.*—Nor is water flowing by percolation. *Haldeman v. Bruckhart*, 5, 108

WAY.

1. *Passing around obstructed way.*—Where one has a right of way over another's land, and the way is not defined, if the owner of the land stops up the way which is in use, the other party will be justified in going over another part of the land. *Farnum v. Platt*, 8, 330

2. *Test of what is a "necessary" or "convenient" way. Abson v. Fenton*, 15, 215

3. *"Railway" covers steam railway—Compensation acts apply to future owners. Bishop v. North*, 15, 220

4. *Carriage of foreign minerals.*—A lease of waste land of a manor contained a reservation to the lessor of the mines and quarries, with full power to win and work the same with free way leave and passage to, from and along the same, on foot or on horseback, with all manner of carriage, and a covenant by the lessor that in working the mines, he would do as slight damage as possible to the soil, etc. Held, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way leave which might rightfully be used for the purpose of working minerals not under the demised property. *Proud v. Bates*, 15, 227

WAY. *Continued.*

5. *Right of way by tunnel—Statute cumulative to custom.*—The statute of 1870, providing for the condemnation of a right of way for ditches, flumes, tunnels, etc., over or through mining claims, is cumulative and does not prevent the enforcement of a similar right where existing by virtue of the local customs of miners. *Bliss v. Kingdom*, 15, 289

WEIGHTS AND MEASURES.

1. *Oil barrels.*—Where a defendant has contracted to deliver a number of barrels of oil, but of no specified capacity, it is for the jury to determine whether the contract was fulfilled by a delivery of a less number of vessels of a greater capacity than the statute barrel. *Cul-lum v. Wagstaff*, 2, 578
2. *Measurement of capacity of ditch.*—The amount of water appropriated by a ditch should be estimated by measuring it according to miners' measurement, near the head of the ditch, when it is full, or conveying all it has capacity to. *Caruthers v. Pemberton*, 4, 622
3. *Contract made subsequent to statute presumed made with reference to statute*, and it was error to allow local custom to control the statute. *Evans v. Myers*, 15, 248
4. *Statute controls custom.*—Local customs can not nullify acts creating a uniform system of weights and measures. *Id.*
5. *Lessee of coal mines confined to screen in use at date of lease.* *Williams v. Sumners*, 15, 246
6. *Statutory modes of weighing exclusive.* *Bourne v. Netherseal Collicry Co.*, 15, 691

WITNESS.

1. *Interest of witness.*—In a suit to recover a mining claim which had been conveyed to the plaintiff by quit-claim deed, an objection that the plaintiff's grantor is an incompetent witness, on the ground of interest, is not well taken. *Johnson v. Parks*, 4, 816
2. *Interested witness—Waiver.*—An objection to the testimony of a witness on the ground of interest, should be made as soon as it appears that he is interested, and a failure to do so then, is a waiver of the objection. *Bear River Mining Co. v. Boles*, 4, 592
3. *Where one party is deceased the survivor can not testify.* *Karns v. Tanner*, 5, 289
4. *Idem.*—When a party to a thing or contract in action is dead and his rights have passed by his own act or law to another, who represents his interest, the surviving party shall not testify to matters occurring in the life of the adverse party. *Id.*
5. *Interested witnesses under chancery practice.*—Under the old chancery practice a complainant might obtain an order to examine a defendant, and a defendant a co-defendant, as a witness, upon an affidavit that he was a material witness and was not interested on the side of the applicant, in the matter as to which it was proper to examine him, but if so interested, his evidence could not be admitted. *Bragg v. Geddes*, 5, 624
6. *An interested witness may be allowed to testify by plaintiff dismissing as to item in which witness is interested.* *Grady v. Early*, 12, 104

WITNESS. *Continued.*

7. *Impeachment of witness* can not be sought through questions relating to matters not involved in the suit. *Hinkle v. S. F. R. Co.*, 5, 645

8. *Defendant liable to decree can not, by release* to his co-defendants *pendente lite*, become a competent witness for them. *Falls v. Carpenter*, 6, 397. The same as to sale by one of the plaintiffs. *Packer v. Heaton*, 4, 447

9. *Disinterested witness*.—The assignee of the lessees of a mine, who had paid for as many loads of ore as he was bound to pay for by the contract of assignment, and who does not appear to be responsible to any one—not to the landlord, because he had performed his agreement with him, and not to the lessees, because he was bound to perform no covenant but his own—is disinterested, and therefore a competent witness. *Fisher v. Milliken*, 8, 856

10. *A witness can not purge himself of interest* by his own *voir dire*. *Pittsburg Co. v. Foster*, 10, 116

11. *A stockholder who has parted with his stock* before suit brought is disinterested, and therefore a competent witness for the company. *Tuolumne Co. v. Columbia Co.*, 10, 634

12. *Interested witness—Stock sold after suit brought*.—One who sells out his shares in an incorporated company after suit is commenced against the corporation, can not testify on behalf of the company, because of his liability for costs; but his competency could be restored by the payment of the costs in addition to the transfer of his stock. *Mokelumne Co. v. Woodbury*, 12, 6

13. *Interest of witness*.—A witness in an action for a disputed mining claim, who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co. v. Oregon Co.*, 12, 94

14. *Balancing of interests*.—Where the interest of a witness is equally balanced between the parties, he is competent and may testify. *Blewett v. Coleman*, 11, 160

15. *Testimony of party in interest under statute of 1841*. *Esker v. Moore*, 12, 686

16. *Competency of witness*.—One who conveys land by deed of general warranty is a competent witness for the complainant in a suit against the grantee, to show that by mistake the deed conveyed a greater interest than the grantor possessed. *Stewart v. Chadwick*, 13, 287

17. *Vendor as witness*.—A vendor who has not received all his purchase money is not a witness disqualified by interest in an action of trespass brought by his vendee against a third party. *Rowe v. Bradley*, 14, 431

18. *Criticism of witness from the bench*.—In regard to a certain witness, the court instructed the jury as follows: "I can scarcely believe that any jury would be willing to accept the testimony of a witness who would declare, upon the stand, that he had made statements in a general way, and for business purposes, outside of the court room,

WITNESS. *Continued.*

and with a view to defraud people with whom he was carrying on negotiations, in opposition to his testimony on the stand." *Hyman v. Wheeler*, 15, 520

19. *Instances of executor or other legal representative of deceased party attempting to testify.* *Bragg v. Geddes*, 5, 624; *Marquart v. Bradford*, 5, 528; *Turner v. Reynolds*, 12, 190; *North Ga. Co. v. Latimer*, 12, 367.

WORKINGS.

1. "*Coal raised*," may signify "coal got or won" or "coal brought to the surface," according to the context. *Senhouse v. Harris*, 8, 508

2. *Winning defined*.—A coal field is won when full, practicable, available access is given to the coal hewers, so that they may enter on the practical work of getting the coal. *Rokeby v. Elliot*, 8, 651

3. *Exhaust of mine, a question of fact.* *Walker v. Tucker*, 8, 678

4. "*Unworkability to profit*" at common law affords no ground for reducing or throwing up a lease of minerals which are in their nature subject to many vicissitudes. There is no warranty in such case to the lessee. *Gowan v. Christie*, 8, 688

5. *Permission to work the mine in the "usual" and "approved" way*, refers simply to the mode of carrying on the underground mines for mining purposes, but does not suppose a custom to work the mines so as to injure or interfere with the rights of other property. *Davis v. Treharne*, 14, 60

6. *Covenant to work undiscovered mines, when discovered, in workmanlike manner*.—*Held*, on demurrer, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, the defendant was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened. *Quarrington v. Arthur*, 15, 255

7. *Instroke*.—A provision in the lease of a coal bank that the lessee shall be treated as having abandoned his lease, if he shall suffer the bank by any fault of his, to lie idle for a year when it would yield coal, does not apply if he be actually taking coal out of the bank by any means of access leading to the coal. *Tiley v. Moyers*, 15, 259

8. *Letting down the roof of a coal mine*, so as to prevent access to barriers of coal left: *Held*, not a ground of complaint where the barriers are not intended to be worked. *Shafto v. Johnson*, 15, 262

9. *The words "proper and workmanlike manner" admit of the evidence of experts*.—The extreme views of this phrase stated. *Lewis v. Fothergill*, 15, 271

10. *Power to legislate to protect workmen*.—The legislature has the power to establish reasonable police regulations for the working of mines, for the protection of the workmen employed therein; and the act requiring underground map of the colliery to be kept is not unconstitutional. *Daniels v. Hilgard*, 15, 280

11. *For damages resulting from natural causes, or from lawful acts done in a proper manner*, the law gives no redress; but when one

WORKINGS. *Continued.*

of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes water to go there at different times and in quantities larger than it would naturally go there, he is answerable for the damages. *Lord v. Carbon Coal Co.*, 15, 696

12. *Each owner must protect himself.* *Jones v. Robertson*, 15, 703

13. *The upper owner may bulkhead*, using ordinary care and skill, and will not be liable for the consequences of an ultimate break and flood. *Id.*

14. *Advantageously mined.*—When a mine is let at a royalty, a certain number of tons to be got annually "provided the ore can be advantageously mined," the lessee is not obliged to get such product when the ore at the pit's mouth is worth less than the cost of winning it. Such clause is for the protection of the lessee and means "beneficially to him." *Garman v. Potts*, 16, 108

15. *Evidence on such clause.*—In an action for rent under such lease, the lessee may prove that the ore could not be mined advantageously, why it could not be done, the cost of mining and putting the ore on the bank, and that when so placed it was not merchantable. *Id.*

16. *"Working the quarry."*—Where a lease was forfeitable for "not working the quarry" during three successive months, and the pit during such period was flooded, work in removal of the water was "working the quarry" under the covenant. Such work and removing debris necessary to win the slate was a working of the pit. *Miller v. Chester Co.*, 16, 288

17. *Evidence of condition of shaft.*—In suit on contract for sinking a shaft, it appeared that the shaft was finished on the 20th of November. Evidence was offered by defendant to show the condition of the shaft in January following, the shaft meanwhile being full of water. *Held*, that the evidence was properly rejected. *Eureka Coal Co. v. Braidwood*, 4, 148

18. *Timbering shaft is voluntary* unless the contract to sink the shaft provide for it. *No. 5 Co. v. Bruce*, 8, 146

TABLE OF CASES

REPORTED IN MINING REPORTS, VOLS. 1 TO 16.

[The first number refers to the volume; the second to the page.]

- | | |
|--|--|
| Abbott v. Omaha Smelting Co.,
Vol. 4, Page 8. | Arkwright v. Gell, 15, 162. |
| Abel v. Love, 11, 850. | Armory v. Delamirie, 10, 66. |
| Abinger v. Ashton, 8, 1. | Armstrong v. Caldwell, 13, 252. |
| Abson v. Fenton, 15, 215. | — v. Lower, 15, 458. |
| Ackerman v. Hartley, 1, 74. | — v. Lower, 15, 681. |
| Acton v. Blundell, 15, 168. | Arnold v. Baker, 7, 111. |
| Adair v. Brimmer, 5, 688. | — v. Foot, 8, 88. |
| Adam v. Briggs Co., 13, 225. | — v. Richmond Works, 9, 193. |
| Adams v. Ore Knob Co., 3, 183. | — v. Stevens, 1, 176. |
| Adams Co. v. Senter, 1, 241. | Arthur v. Griswold, 7, 46. |
| Adderly v. Storm, 13, 485. | Ashworth v. Stanwix, 9, 674. |
| Ah He v. Crippen, 10, 867. | Astry v. Ballard, 8, 816. |
| Ahl's Appeal, 3, 638. | Atchison v. Peterson, 1, 583. |
| Ah Pong <i>Ex parte</i> , 1, 507. | Atkins v. Gamble, 13, 514. |
| Ahren v. Dubuque Lead Co., 5, 144. | — v. Hendree, 2, 328. |
| Ahrens v. Adler, 12, 114. | Atkinson v. Amador Co., 13, 423. |
| Ah Yew v. Choate, 1, 492. | Atlas Co. v. Johnston, 1, 888. |
| Alden's Appeal, 13, 139. | Attersoll v. Stevens, 10, 67. |
| Alderson v. Ennor, 8, 526. | Attorney General v. Bay State Co.,
14, 158. |
| Alexander v. Cauldwell, 5, 650. | Attwood v. Fricot, 2, 805. |
| — v. Sherman, 15, 638. | Audenried v. Woodward, 12, 641. |
| Alford v. Barnum, 10, 423. | Aurora Hill Co. v. '85 Mining Co.,
15, 581. |
| Allen v. Barkley, 14, 246. | Austin v. Huntsville Co., 9, 115. |
| — v. Gilreath, 6, 470. | |
| Allison and Evans' Appeal, 11, 142. | Babcock v. Case, 6, 618. |
| American Co. v. Bradford, 15, 190. | — v. Stewart, 11, 447. |
| — v. North Belleville Co., 10, 594. | Backhouse v. Bonomi, 13, 677. |
| Ames v. New Jersey Franklinite
Co., 10, 434. | Baglan Hall Co., <i>In re</i> , 13, 261. |
| Anderson v. Harvey's Heirs, 7, 291. | Bagnall v. London Co., 5, 362, 366. |
| — v. Simpson, 9, 262. | Bagot v. Bagot, 15, 130. |
| Anspach v. Bast, 12, 110. | Bagshaw v. Seymour, 6, 510. |
| Anthony v. Jillson, 16, 26. | Bailey v. Philadelphia Co., 3, 599. |
| Antoine Co. v. Ridge Co., 10, 97. | — v. Watkins, 6, 387. |
| Ardesco Co. v. Gilson, 10, 669. | Bainbridge v. Gehring, 3, 40. |
| — v. North American Co., 8, 589. | Baird v. Williamson, 4, 363. |
| — v. Richardson, 11, 181. | Baker v. Chase, 12, 66. |

- Baker v. Howell, 12, 73.
 — v. King, 14, 404.
 — v. McDowell, 13, 84.
 Baldwin v. U. S. Tel. Co., 3, 70.
 Bankart v. Houghton, 11, 87.
 Bank of Deer Lodge v. Hope Co.,
 1, 448.
 Bannon v. Mitchell, 2, 103.
 Banta v. Savage, 7, 113.
 Barber v. Cazalis, 2, 684.
 Barker v. Dale, 8, 597.
 Barkley v. Tieleke, 4, 666.
 Barksdale v. Finney, 14, 541.
 Barnard v. McKenzie, 9, 403.
 Barnes v. Sabron, 4, 673.
 Barnum v. Landon, 14, 250.
 Barrs v. Lea, 12, 646.
 Bartlett Co. v. Roach, 10, 682.
 Barton Co. v. Cox, 10, 157.
 Basey v. Gallagher, 1, 633.
 Basset v. Basset, 14, 359.
 Bassett v. Monte Christo Co., 4, 108.
 Basshor v. Dressel, 3, 591.
 — v. Forbes, 13, 530.
 Bates v. Sierra Nev. Co., 1, 345.
 Bayles v. Baxter, 14, 561.
 Bean v. Valle, 13, 292.
 Beard v. Converse, 2, 670.
 Bear River Co. v. Boles, 4, 592.
 — v. New York Co., 4, 526.
 Beatty's Appeal, 9, 346.
 Beatty v. Gregory, 9, 84.
 Beaufort v. Bates, 6, 75.
 Beaumont v. Boulton, 1, 253, 263,
 278.
 — v. Field, 1, 281.
 Beck v. Kantorowicz, 6, 480.
 Becker v. Pugh, 15, 304.
 Bedford v. Bagshaw, 6, 514.
 Beeker v. Hastings, 2, 688.
 Beem v. McKusick, 2, 533.
 Belk v. Meagher, 1, 510, 523.
 Bell v. Bed Rock Co., 1, 45.
 — v. Brown, 5, 240.
 — v. Schultz, 14, 77.
 — v. Truit, 8, 649.
 — v. Wilson, 10, 415.
 Belle Green Co. v. Tuggle, 5, 464.
 Bennett v. Griffiths, 8, 21.
 — v. Shaughnessy, 16, 276.
 Bennitt v. Whitehouse, 8, 17.
 Benninger v. Hankee, 3, 18.
 Benson v. Miners' Bank, 13, 107.
 Bentley v. Bates, 10, 525.
 Bercich v. Marye, 13, 544.
 Berea Co. v. Kraft, 10, 16.
 Bewick v. Fletcher, 6, 117.
 Bickel's Appeal, 14, 591.
 Bigley v. Risher, 13, 176.
 Big Mountain Improvement Co.'s
 Appeal, 5, 178.
 Bill v. Sierra Nevada Co., 7, 413.
 Billings v. Taylor, 5, 65.
 Binney v. Ince Hall Co., 11, 410.
 Birchett v. Falls, 6, 397.
 Birmingham v. Allen, 14, 14.
 Birmingham Co. v. Lloyd, 8, 166.
 Bishop v. Goodwin, 12, 637.
 — v. North, 15, 220.
 Bishop of London v. Web, 7, 247.
 Blackwell v. Atkinson, 15, 71.
 — v. Overby, 10, 531.
 Blain v. Agar, 6, 388, 393.
 Blaisdell v. Stephens, 7, 599.
 Blake v. Butte S. M. Co., 9, 503.
 — v. Griswold, 4, 15.
 Blakesley v. Whieldon, 8, 8.
 Blen v. Bear River Co., 3, 435.
 Blewett v. Coleman, 11, 160.
 Bliss v. Kingdom, 15, 239.
 Blodgett v. Potosi Co., 3, 275.
 Boardman v. Thompson, 6, 240.
 Boggs v. Merced M. Co., 10, 334.
 Bolen v. San Geronimo Co., 4, 116.
 Bond v. Mt. Hope Co., 14, 500.
 Bonesteel v. Bonesteel, 9, 667.
 Bonnell v. Griswold, 4, 15.
 Boone v. Stover, 9, 326.
 Booth v. Pollard, 13, 323.
 Boston Co. v. Condit, 14, 301.
 Boswell v. Green, 2, 363.
 — v. Laird, 10, 616.
 Boucher v. Mulverhill, 12, 350.
 Boulder Valley Co. v. Tierney, 2,
 881.
 Bourne v. Netherseal Coll. Co., 15,
 691.
 Bowes v. Ravensworth, 2, 353.
 Bowker v. Goodwin, 10, 149.
 Bowler v. Wolley, 13, 65.

Bowman v. Bates, 6, 868.
 — v. Irons, 18, 812.
 Bowyer v. Seymour, 9, 67.
 Boyd v. Merriell, 9, 664.
 Boylan v. Huguet, 14, 508.
 Boyle v. Laird, 7, 801.
 Bracken v. Preston, 7, 267.
 — v. Rushville Co., 8, 273.
 Bradbury v. Barnes, 11, 854.
 — v. Cronise, 9, 866.
 — v. Davis, 8, 898, 408.
 Bradley v. Ballard, 3, 568.
 — v. Harkness, 11, 889.
 — v. Lee, 4, 470.
 — v. Poole, 6, 581.
 — v. South Car. Phosphate Co.,
 9, 828.
 Bragg v. Geddes, 5, 624.
 Brainerd v. Arnold, 8, 478.
 Brandling v. Owen, 4, 129.
 Brandow v. Pocotillo Co., 4, 887.
 Brandt v. McKeever, 9, 216.
 — v. Wheaton, 1, 145.
 Braxon v. Bressler, 18, 168.
 Brayton v. New England Co., 18,
 458.
 Breading v. Boggs, 11, 296.
 Breed v. First Nat. Bank, 1, 467.
 — v. Judd, 12, 293.
 Brehen v. O'Donnell, 18, 897.
 Brennan v. Gaston, 7, 424, 426.
 Brewer v. Marshall, 4, 119.
 Brewster v. Lathrop, 2, 552.
 — v. Sime, 14, 578.
 Briggs v. Davis, 14, 585.
 Briggs Co. v. North Adams Co., 14,
 482.
 Brigham v. Hawley, 2, 59.
 Broder v. Natoma Water Co., 4,
 670; 5, 88.
 Bronson v. Lane, 14, 848.
 Brook v. Badley, 12, 649.
 Brophy Co. v. Brophy Co., 10, 601.
 Brough v. Homfray, 15, 6.
 Brown v. Ashley, 12, 168.
 — v. Byers, 1, 808.
 — v. Caldwell, 12, 674.
 — v. Corey, 5, 868.
 — v. '49 Co., 9, 600.
 — v. Gaston Co., 1, 876.

Brown v. Kidger, 11, 848.
 — v. Morris, 8, 177.
 — v. Pease, 8, 46.
 — v. Robins, 18, 669.
 — v. Smith, 4, 539.
 — v. Torrence, 10, 692.
 Bruff v. Mali, 6, 574.
 Brundage v. Adams, 11, 470.
 Buck v. Lodge, 14, 623.
 Buckley v. Howell, 18, 245.
 Bullard v. Kinney, 11, 848.
 Bullion Co. v. Croesus Co., 5, 254.
 Bullion, Beck & C. Co. v. Eureka
 Hill Co., 15, 449.
 Burdge v. Smith, 12, 448.
 — v. Underwood, 4, 517.
 Burdon v. Barkus, 11, 857.
 Burgan v. Lyell, 11, 237.
 Burke v. Flood, 5, 469.
 — v. Table Mountain Co., 5, 209.
 Burmester v. Norris, 8, 449.
 Burnett v. Whitesides, 7, 407.
 Burns v. McCabe, 7, 1.
 Burr v. Spencer, 8, 450.
 Burton v. Wilkes, 8, 88.
 — v. Wookey, 11, 842.
 Busenius v. Coffee, 5, 214.
 Bush v. Sullivan, 9, 214.
 Bushnell v. Church, 2, 479.
 — v. Proprietors of Ore Bed, 8,
 258.
 Bute v. Thompson, 8, 371.
 Butte Co. v. Morgan, 4, 588.
 — v. Vaughn, 4, 552.
 Butterfield v. Beardsley, 11, 495.
 Bwlch y Plwm Co. v. Baynes, 6,
 596.
 Byard v. Holmes, 6, 598, 657.
 Bybee v. Hawkett, 11, 594.
 Byers v. Franklin Co., 12, 27.
 Cabe v. Dixon, 18, 857.
 Caddick v. Skidmore, 18, 883.
 Cadwalader's Appeal, 14, 565.
 Cahill v. Bennett, 5, 664.
 Caldwell v. Copeland, 1, 189.
 — v. Fulton, 8, 238.
 Cameron v. Seaman, 18, 584.
 Campbell v. Bear River Co., 10,
 656.

- Campbell v. Fleming, 6, 835.
 — v. Gates, 2, 502.
 — v. Metcalf, 7, 656.
 — v. Rankin, 12, 257.
 — v. West, 1, 218.
 Canal Co. v. Carroll, 10, 47.
 Canfield v. Ford, 11, 201.
 Canter v. Colorado United M. Co.,
 15, 559.
 Caples v. Steel, 15, 1.
 Capner v. Flemington Co., 7, 268.
 Capron v. Strout, 9, 891.
 Carey v. Philadelphia Co., 1, 849.
 Carlyon v. Lovering, 14, 897.
 Carnahan v. Brown, 5, 198.
 Carne v. Mitchell, 2, 496.
 Carondelet Works v. Moore, 2, 625.
 Carothers v. Connolly, 18, 894.
 Carpenter v. Biggs, 1, 407.
 — v. Black Hawk Co., 10, 582.
 — v. Falls, 6, 897.
 Carr v. Chartiers Co., 8, 476.
 — v. Le Fevre, 8, 477.
 Carter v. Hoke, 12, 579.
 — v. Philadelphia Co., 2, 297.
 — v. Whalley, 1, 262.
 Caruthers v. Pemberton, 4, 622.
 Castor v. McShaffery, 14, 498.
 Castleberry v. State, 4, 224.
 Cate v. Sanford, 8, 124.
 Central Co. v. Standard Co., 7, 604,
 628.
 Chadbourne v. Davis, 15, 620.
 Chadwick v. Coleman, 14, 9.
 Chalfant v. Williams, 2, 548.
 Chamberlain v. Collinson, 9, 86.
 — v. Parker, 10, 144.
 Champion M. Co. v. Consolidated
 Wyo. Co., 16, 145.
 Chandeler v. Lopus, 15, 70.
 Chapman v. Briggs Co., 2, 524.
 — v. Porter, 1, 102.
 — v. Toy Long, 1, 497.
 Charles v. Eshelman, 2, 65.
 Chase v. Savage Co., 9, 476.
 Chatham Furnace Co. v. Moffatt,
 16, 108.
 Cheesman v. Hart, 12, 263.
 — v. Shreve, 16, 79.
 Cheney v. Barber, 2, 692; 8, 66.
 Cherokee Co. v. Jones, 8, 626.
 Chester Co. v. Lucas, 3, 343.
 Chetham v. Williamson, 9, 176.
 Chew v. Henrietta Co., 4, 67.
 Chicago Co. v. Chicago Co., 2, 634.
 — v. Liddell, 8, 126.
 — v. Northern Ill. Co., 15, 198.
 — v. U. S. Petroleum Co., 12,
 570.
 Child v. Hugg, 18, 512.
 Christie's Appeal, 9, 49.
 City of Tiffin v. McCormick, 2, 194.
 — Virginia v. Chelar Potosi Co.,
 14, 120.
 Clapham v. Shiffito, 6, 481.
 Clark v. Babcock, 8, 590.
 — v. Jones, 14, 842.
 — v. McElvy, 8, 254.
 — v. Willett, 4, 638.
 Clarke v. Dickson, 6, 533.
 Clavering v. Clavering, 14, 858.
 Clayton v. Gregson, 9, 141.
 Clegg v. Clegg, 14, 289.
 — v. Dearden, 5, 88.
 — v. Edmondson, 8, 180.
 — v. Jones, 7, 572.
 — v. Rowland, 8, 520.
 Clement v. Youngman, 5, 290.
 Cleveland Co. v. Ball, 5, 383.
 Clifton v. Walmsley, 8, 323.
 Clowser v. Joplin Co., 10, 222.
 Coal Creek M. Co. v. Moses, 15, 544.
 Coalfield Co. v. Peck, 18, 628.
 Coates v. Cheever, 5, 55.
 Cochran v. O'Keefe, 2, 288.
 Coffman v. Robbins, 8, 181.
 Coker v. Simpson, 7, 330.
 Cole Co. v. Virginia Co., 7, 508,
 516.
 Coleman's App., 14, 221.
 — v. Chadwick, 14, 9.
 — v. Coleman, 11, 183.
 — v. Columbia Oil Co., 3, 433.
 Collier v. Steinhart, 10, 1.
 Collins v. Case, 1, 91.
 Colman v. Clements, 5, 247.
 Columbia Co. v. Com. 14, 197.
 — v. Holter, 2, 14.
 — v. Miller, 9, 21.
 Colvin v. McCune, 1, 223.

- Com. v. Bonnell, 15, 14.
 — v. Conyngham, 8, 32.
 — v. Ocean Oil Co., 14, 126.
 — v. Penn Gas Coal Co., 14, 163.
 — v. Wilkesbarre C. Co., 15, 31.
 Comyn v. Kyneto, 5, 193.
 — v. Wheatly, 5, 193.
 Conant v. Smith, 11, 199.
 Conger v. Weaver, 1, 594.
 Conner v. McPhee, 9, 570.
 Cons. Channel Co. v. Central Co.,
 5, 438.
 Cons. Gregory Co. v. Baber, 1, 405.
 Cons. Republican Mtn. M. Co. v.
 Lebanon M. Co., 15, 490.
 Cook v. Andrews, 3, 171.
 " ada. Linn, 2, 49.
 Cooper v. Lovering, 6, 663.
 Copper Co. v. Beach, 8, 326.
 Copper Hill Co. v. Spencer, 3, 267.
 Corbett v. Berryhill, 14, 671.
 Cornelius v. Molloy, 6, 456.
 Corning Tunnel Co. v. Pell, 14, 612.
 Correa v. Frietas, 2, 336.
 Coryell v. Cain, 5, 226.
 Cotheal v. Talmage, 12, 299.
 Courchaine v. Bullion Co., 12, 235.
 Cowan v. Hardeman, 13, 113.
 — v. Radford Iron Co., 15, 453.
 Cowper v. Baker, 7, 253.
 Cox v. Bishop, 8, 455.
 — v. Groshong, 6, 210.
 Coyote Co. v. Ruble, 4, 88.
 Crandall v. Woods, 1, 604.
 Crane v. Winsor, 11, 69.
 Crary v. Campbell, 3, 270.
 Crater v. Bininger, 10, 124; 11, 487.
 Crawford v. Wick, 3, 541.
 Crawshaw v. Maule, 11, 223.
 Creighton v. Evans, 8, 123.
 — v. Vanderlip, 7, 172.
 Crompton v. Lea, 6, 179.
 Cross v. McClenahan, 12, 669.
 Crossman v. Pendery, 4, 431.
 Crouch v. Puryear, 15, 113.
 Crowley v. Genesee Co., 4, 71.
 Crump v. U. S. Co., 3, 454.
 Cullacott v. Cash G. & S. M. Co.,
 15, 392.
 Cullen v. Rich, 1, 173.
 Cullins v. Flagstaff Co., 9, 412.
 Cullum v. Wagstaff, 2, 573.
 Cumberland Co. v. Parish, 1, 423.
 — v. Sherman, 1, 322.
 Currier v. Lebanon Slate Co., 18,
 559.
 Curtin v. Munford, 12, 585.
 Cutter v. Demmon, 3, 119.
 Dahl v. Raunheim, 16, 214.
 Dale v. Roosevelt, 6, 389.
 Dall v. Confidence Co., 11, 214.
 Daniels v. Hilgard, 15, 280.
 — v. Wilber, 2, 283.
 Dannmeyer v. Coleman, 5, 474.
 Dark v. Johnston, 9, 233.
 Darvill v. Roper, 10, 406.
 Daubenspeck v. Grear, 7, 429.
 Davidson v. Jordan, 7, 54.
 — v. Rankin, 12, 472.
 Davis v. Alvord, 9, 334.
 — v. Butler, 1, 7.
 — v. Flagstaff Co., 2, 660.
 — v. Gale, 4, 604.
 — v. Henry, 6, 630.
 — v. Shepherd, 6, 24.
 — v. Treharne, 14, 60.
 Day v. Holmes, 2, 276.
 Dayton Co. v. Seawell, 5, 424.
 Dean v. Thwaite, 1, 77.
 Dean of Ely v. Warren, 4, 233.
 Decker v. Howell, 11, 492.
 De Costa v. Massachusetts Co., 10,
 93.
 Deep River Co. v. Fox, 1, 296.
 Deidesheimer, ex p. 8, 41.
 Delaware Canal Co. v. Carroll, 10,
 47.
 Delaware R. R. Co. v. Oxford Iron
 Co., 9, 417.
 Delmonico v. Roudebush, 3, 195.
 De Noon v. Morrison, 16, 33.
 Densmore Co. v. Densmore, 3, 569.
 De Pass's Case, 2, 36.
 Depuy v. Williams, 5, 251.
 Derry v. Ross, 1, 1.
 Desloge v. Pearce, 9, 247.
 Dexter Lime Rock Co. v. Dexter,
 4, 291.
 Dickenson v. Bolyer, 9, 415.

- Dickson v. Moffat, 12, 666.
 Dobschuetz v. Holliday, 6, 108.
 Dodge v. Marden, 1, 68.
 Doe v. Axley, 8, 472.
 — v. Bancks, 6, 278.
 — v. Wood, 9, 182.
 Dougherty v. Creary, 1, 85.
 — v. Haggin, 15, 211.
 Douglass v. Ireland, 4, 82.
 Dousman v. Wisconsin & L. S. Co.,
 13, 578.
 Douty v. Bird, 14, 454.
 Doyle v. Peerless Co., 14, 569.
 Draper v. Douglass, 5, 601.
 Drummond v. Long, 15, 510.
 Dudley v. Warde, 6, 84.
 Duff v. Maguire, 12, 358.
 Duffield v. Brainerd, 11, 526.
 Dugdale v. Robertson, 13, 662.
 Dundas v. Muhlenberg, 14, 437.
 Dunning v. Rankin, 9, 455.
 Du Prat v. James, 15, 341.
 Durham v. Carbon Coal Co., 15,
 380.
 Duryea v. Burt, 11, 395.
 Dutch Flat Co. v. Mooney, 6, 808.

 Eagan v. Delaney, 5, 223.
 Eagle v. Bucher, 12, 330.
 Earl of Rosse v. Wainman, 10, 398.
 Early v. Friend, 14, 271.
 East v. Ealer, 2, 274.
 East Jersey Co. v. Wright, 9, 332.
 Ecclesiastical Com'rs v. North East
 Ry. Co., 12, 609.
 Ecker v. Moore, 12, 685.
 Eddy v. Simpson, 15, 175.
 Edgewood Co's Appeal, 5, 406.
 Edwards v. Allouez M. Co., 7, 577.
 Efford v. South Pacific Coast R.
 Co., 7, 557.
 Ege v. Kille, 10, 212.
 Eilers v. Boatman, 15, 462, 471.
 Eldridge v. Wright, 7, 418.
 Elias v. Snowdon Slate Q. Co.,
 15, 143.
 Ellis v. Duncan, 15, 182.
 — v. Schmoeck, 13, 259.
 Ellison v. Jackson Co., 4, 559.
 Elwell v. Crowther, 7, 488.

 Ely v. Warren, 4, 233.
 Emery v. Owings, 8, 378.
 Emma Mine Case, 7, 498.
 Emmons v. McKesson, 7, 409.
 English v. Johnson, 12, 202.
 Ennor v. Barwell, 12, 101.
 Ensminger v. McIntire, 14, 440.
 Enterprise Co's Appeal, 12, 599.
 Erhardt v. Boaro, 4, 432, 434; 15,
 447, 472.
 Ernest v. Vivian, 8, 205.
 Erwin's Appeal, 16, 91.
 Escoubas v. Louisiana Co., 12, 343.
 Eselman v. Thompson, 4, 146.
 Esmond v. Chew, 5, 175.
 Eureka Co. v. Braidwood, 4, 148.
 — v. Richmond Co., 8, 144; 9, 578.
 Evans v. Haefner, 5, 844.
 — v. Myers, 15, 243.
 Evans' Appeal, 8, 255.
 Everett v. Hydraulic Flume Co.,
 4, 589.

 Fabian v. Collins, 5, 20.
 Fair v. Stevenot, 11, 11.
 Fairbanks v. Woodhouse, 12, 86.
 Faith v. Richmond, 11, 265.
 Falls v. Carpenter, 6, 397.
 — v. McAfee, 7, 639.
 Farnum v. Platt, 8, 330.
 — v. U. S., 4, 192.
 Faulds v. Yates, 3, 551.
 Fawcett v. Whitehouse, 11, 250.
 Faxon v. Barnard, 9, 515.
 Fay v. Steamer New World, 2, 417.
 Featherstonhaugh v. Lee Moor
 Co., 3, 496.
 Feely v. Shirley, 12, 182.
 Felger v. Coward, 5, 273.
 Fereday v. Wightwick, 11, 247.
 Ferron v. Sturgeon, 4, 319.
 Feversham v. Emerson, 5, 500.
 Field v. Beaumont, 7, 257.
 — v. Pierce, 3, 535.
 Findlay v. Smith, 13, 182.
 Finerty v. Fritz, 1, 437.
 Firmstone v. DeCamp, 10, 439.
 — v. Wheeley, 12, 76.
 First Nat. Bank v. Bissell, 11, 546.
 — v. How, 12, 134.

- First Nat. Bk. v. Price, 18, 485.
 Fisher v. Milliken, 8, 895.
 — v. Worrall, 14, 624.
 Fitch v. Archibald, 2, 555.
 Fitz v. Bynum, 18, 612.
 Fitzgerald v. Urton, 12, 198.
 Flagg v. Lady Bryan Co., 3, 526.
 Flagstaff Co. v. Patrick, 4, 19.
 — v. Tarbet, 9, 607.
 Flaherty v. Gwinn, 12, 605.
 Fleeson v. Savage Co., 8, 158.
 Fletcher v. Great W. Ry. Co., 12
 521.
 — v. Hawkins, 11, 290.
 — v. Smith, 5, 78.
 Flint v. Brandon, 18, 808.
 — v. Eureka Co., 11, 588.
 Fogus v. Ward, 5, 1.
 Foley v. Addenbrooke, 8, 849.
 — v. Fletcher, 4, 180.
 Foot v. Marsh, 10, 185.
 Foote v. National Co., 9, 605.
 Forbes v. Gracey, 14, 188.
 Foreman v. Bigelow, 18, 269.
 Forsyth v. North Am. Oil Co., 11,
 115.
 — v. Wells, 14, 498.
 Fort Scott Co. v. Sweeney, 14, 166.
 Foster v. Weaver, 15, 551.
 Fothergill v. Phillips, 14, 677.
 420 M. Co. v. Bullion Co., 1, 114;
 11, 608.
 Fox v. Frith, 11, 277.
 Fraler v. Sears Co., 12, 98.
 Frank Co. v. Larimer Co., 1, 150.
 Frank's Co. v. McCleary, 18, 477.
 Franklin Co. v. McMillan, 10, 224.
 Freck v. Locust Mtn. Co., 9, 57.
 Freeland v. Hoffman, 18, 289.
 Fremont v. Crippen, 6, 221.
 — v. Flower, 12, 418.
 — v. Merced Co., 7, 832; 9, 659.
 — v. Seals, 11, 632.
 French v. Brewer, 11, 108.
 Frisbee's Appeal, 14, 844.
 Frisbee v. Irvin, 14, 844.
 Fuhr v. Dean, 6, 216.
 Fuller v. Swan River Co., 16, 252.
 Fulton v. Roosevelt, 6, 869.
 Funk v. Haldeman, 7, 208.
 Gaines v. Green Pond Co., 15, 158.
 Gale v. Oil Run Co., 9, 1.
 Ganter v. Atkinson, 9, 18.
 Garthe v. Hart, 15, 492.
 Gartside v. Outley, 10, 566.
 Garman v. Potts, 16, 108.
 Gashwiler v. Willis, 8, 516.
 Gaston v. Plum, 11, 168.
 Gatewood v. McLaughlin, 18, 887.
 Gear v. Shaw, 7, 643.
 Geiger v. Green, 18, 824.
 Gelcich v. Moriarty, 9, 498.
 Gerber v. Stuart, 2, 152.
 Gerrens v. Huhn Co., 2, 632.
 Getty v. Devlin, 7, 29, 119.
 Gibben v. Atkinson, 15, 428.
 Gibbs v. David, 12, 591.
 Gibson v. Puchta, 12, 227.
 — v. Smith, 15, 111.
 — v. Tyson, 18, 72.
 Giddings v. Sears, 2, 281.
 Gifford v. Carvill, 6, 558.
 Gillan v. Hutchinson, 2, 817.
 Gillett v. Treganza, 7, 432.
 Gilmore v. Driscoll, 14, 87.
 — v. Hunt, 10, 184.
 Glamorganshire Co. v. Irvine, 6,
 565.
 Gleeson v. Martin White Co., 9,
 429.
 Glidden v. Norvell, 18, 170.
 Gloninger v. Franklin Co., 9, 278.
 Godfrey v. White, 11, 562.
 Golden Fleece Co. v. Cable Co., 1,
 120.
 Golden Terra Co. v. Mahler, 4, 890.
 Gold Hill v. Caledonia S. M. Co.,
 14, 202.
 Gold Hill Co. v. Ish, 11, 635.
 Goller v. Fett, 11, 171.
 Gonu v. Russell, 12, 630.
 Gooch v. Sullivan, 5, 14.
 Goodright v. Swymmer, 5, 200.
 Goodspeed v. Wasatch Works, 11,
 178.
 Gordon v. Darnell, 2, 220.
 — v. Swan, 8, 84.
 Gore v. McBrayer, 1, 645.
 Gottschall v. Melsing, 1, 667.
 Gowan v. Christie, 8, 688.

- Grady v. Early, 12, 104.
 Graham v. Pierce, 14, 308.
 Granby Co. v. Turley, 9, 848.
 Grant v. Law, 8, 80.
 Graver v. Scott, 2, 644.
 Graves v. Poage, 5, 670.
 Green v. Ashland Co., 12, 692.
 — v. Gilbert, 2, 694.
 — v. Ophir Co., 12, 140.
 — v. Prettyman, 5, 515.
 — v. Sparrow, 12, 685.
 Greenwood's Appeal, 14, 608.
 Gregory v. Harris, 14, 91.
 — v. Nelson, 12, 124.
 — v. Pershbaker, 15, 609.
 Grey v. Northumberland, 7, 250;
 251.
 Griffin v. Fellows, 8, 657.
 Griffiths v. Gidlow, 10, 669.
 — v. Rigby, 2, 528.
 Grisewood & Smith's Case, 2, 86.
 Grove v. Donaldson, 2, 507.
 — v. Hodges, 2, 693.
 Grubb's Appeal, 3, 416; 14, 221.
 Grubb v. Bayard, 9, 199.
 — v. Grubb, 7, 226.
 — v. Guilford, 5, 163.
 Grymes v. Sanders, 10, 445.
 Gwillim v. Donnellan, 15, 482.

 Hacker v. National Co., 13, 533.
 Hail v. Reed, 11, 103.
 Haines v. Roberts, 18, 663.
 Haldeman v. Bruckhart, 5, 163.
 Hale & Norcross Co. v. Storey
 County, 14, 115.
 Hall v. Fisher, 12, 88.
 — v. Hopwood, 15, 42.
 — v. Johnson, 9, 694.
 Halsey v. Martin, 10, 549.
 Hamill v. Thompson, 14, 696.
 Hamilton v. Kneeland, 2, 593.
 — v. South Nev. Co., 15, 314.
 Hamner v. Garfield Co., 16, 125.
 Hancock v. Hodgson, 11, 693.
 — v. Watson, 10, 546.
 Hand v. Dexter, 8, 603.
 Handrahan v. Cheshire Works, 12, 9.
 Hanley v. Wood, 9, 182.
 Hanover Co. v. Ashland Co., 10, 204.

 Hanson v. Boothman, 2, 217.
 — v. Martin, 5, 643.
 Hardenbergh v. Bacon, 1, 352.
 Hardy v. Stonebraker, 7, 10.
 Hargrave v. King, 8, 406.
 — v. Smith, 14, 395.
 Harkness v. Burton, 9, 313.
 Harlan v. Lehigh Co., 8, 496.
 Harlow v. Lake Superior Co., 9,
 47; 8, 285.
 Harris v. Equator Co., 12, 173.
 — v. Tyson, 14, 624.
 Hartford Co. v. Miller, 3, 353.
 Harts v. Brown, 4, 1.
 Hartwell v. Camman, 3, 229.
 Harvey v. Coffin, 12, 336.
 — v. Ryan, 4, 490.
 — v. Sides Co., 10, 107.
 Hasson v. Oil Creek R. R., 12, 547.
 Hawkins v. Mansfield Co., 13, 561.
 Hawley v. Brumagim, 13, 464.
 Hawseville v. Hawse, 7, 193.
 Hawtayne v. Bourne, 1, 285.
 Hawxhurst v. Lander, 12, 314.
 Haywood v. Cope, 6, 499.
 Hazleton Co. v. Buck Mtn. Co., 2,
 389.
 Head v. Fordyce, 12, 470.
 Hebrard v. Jefferson Co., 5, 279.
 Hecksher v. Shoemaker, 2, 131.
 Hedge & Horn's Appeal, 11, 462.
 Heffner v. Lewis, 6, 93.
 Heeg v. Licht, 11, 74.
 Hellman v. Holladay, 7, 163.
 Henderson v. Allen, 6, 227.
 Hendrix v. McBeth, 5, 74.
 Henry v. Everts, 5, 603.
 Henshaw v. Clark, 14, 494.
 Herbert v. King, 5, 303.
 Hess v. Winder, 12, 217.
 Heydenfeldt v. Daney Co., 13, 204.
 Hicks v. Jennings, 7, 133.
 Higgins v. Houghton, 13, 195.
 — v. Barker, 7, 525.
 Higham v. Wright, 10, 24.
 Highland Ditch Co. v. Mumford, 2,
 8.
 Hill v. King, 4, 533.
 — v. Newman, 4, 513.
 — v. Smith, 4, 597.

- Hill v. Spencer**, 1, 414.
 — **v. Sumner**, 16, 281.
 — **v. Taylor**, 12, 568.
Hillyer v. Overman Co., 3, 44.
Hilton v. Woods, 10, 110.
Hinkle v. San Francisco Co., 5, 645.
Hirbour v. Reedling, 11, 514.
Hitchens v. Nougues, 14, 649.
Hixon v. Pixley, 11, 555.
Hobart v. Ford, 15, 286.
 — **v. Wicks**, 2, 1.
Hodgkinson v. Fletcher, 1, 178.
Hodgson v. Moulson, 8, 511.
Hodgson v. Perkins, 16, 116.
Hoeveler v. Mugele, 14, 654.
Hoffman v. Stone, 4, 520.
Holland v. Mt. Auburn Co., 9, 497.
Holmes v. Day, 2, 276.
Honor v. Albrighton, 11, 6.
Hope M. Co. v. Kennon, 14, 189.
 — **v. In re**, 9, 364.
Hopkins v. Noyes, 15, 287.
Horner v. Watson, 14, 1.
Horswell v. Ruiz, 15, 488.
House v. Palmer, 13, 104.
Houtz v. Gisborn, 2, 849.
Heward v. Brigham, 3, 1.
Hoyt v. Quicksilver Co., 4, 47.
 — **v. Smith**, 12, 306, 315, 321, 335.
Hudson Co. v. Stockbridge Co., 13, 120.
Huff v. McCauley, 2, 269.
 — **v. McDonald**, 14, 262.
Huffman v. Hummer, 2, 242.
Hughes v. Devlin, 12, 241.
Hugunin v. McCunniff, 14, 468.
Humphreys v. Mooney, 4, 76.
Hunter v. Savage Co., 9, 357.
Huntingdon Co. v. English, 10, 233.
Hurd v. Gill, 9, 306.
Hutchison v. Com., 4, 208.
Hyman v. Wheeler, 15, 519.

Illinois Co. v. Ogle, 10, 196; 233.
Iron Mine v. Loella Mine, 1, 548.
Iron S. M. Co. v. Campbell, 16, 218.
Iron Silver Co. v. Cheeseman, 9, 552.
Iron Silver M. Co. v. Elgin M. & S. Co., 15, 641.

Iron Silver M. Co. v. Murphy, 1, 548.
Irvine v. Hanlin, 14, 241.
Irwin v. Covode, 15, 120.
 — **v. Davidson**, 7, 287.
 — **v. Harris**, 14, 534.
 — **v. Phillips**, 15, 178.
Isaacs v. McAndrew, 9, 690.
Ivanhoe Co. v. Keystone Co., 13, 214.

Jackson v. Allen, 7, 127.
 — **v. Feather River Co.**, 5, 594.
 — **v. McMurray**, 12, 164.
 — **v. Olits**, 5, 202.
 — **v. Stoetzel**, 1, 228.
 — **v. Walton**, 14, 486.
Jackson M. Co. v. The Auditor General, 14, 182.
Janes v. Scott, 7, 181.
Jefferys v. Fairs, 13, 367.
Jeffords v. Hine, 15, 575.
Jeffries v. Williams, 13, 645.
Jegon v. Vivian, 8, 623.
Jenkins v. Redding, 14, 646.
Jennings v. Broughton, 12, 405.
 — **v. Rickard**, 15, 624.
Jennison v. Kirk, 4, 504.
Jeany Lind Co. v. Bower, 5, 589.
Job v. Potton, 14, 329.
Joch v. Dankwardt, 19, 990.
Johnson v. Badger Co., 3, 386.
 — **v. Buell**, 9, 502.
 — **v. Lamping**, 14, 450.
 — **v. Parks**, 4, 316.
Johnston's Appeal, 15, 556.
Johnston v. Cowan, 9, 299.
 — **v. Mendenhall**, 15, 101.
 — **v. Shelton**, 4, 808.
Johnstone v. Robinson, 12, 396.
Johnstown Iron Co. v. Cambria Co., 9, 226.
Jones v. Bolles, 5, 444.
 — **v. Clark**, 11, 473.
 — **v. Jackson**, 14, 72.
 — **v. Kent**, 3, 190.
 — **v. Robertson**, 15, 703.
 — **v. Shears**, 8, 333.
 — **v. Wagner**, 13, 690.
Jowett v. Spencer, 2, 499.

- Judge v. Braswell, 11, 508.
 Jupiter Co. v. Bodie Co., 4, 411.

 Kahn v. Hamilton, 14, 608.
 — v. Old Telegraph Co., 7, 559;
 11, 645.
 — v. Smelting Co., 11, 540.
 Kalb v. Kantorowicz, 6, 480.
 Kamphouse v. Gaffner, 2, 257.
 Kantorowicz v. Carter, 6, 480.
 Karns v. Tanner, 5, 289.
 Keeler v. Green, 12, 465.
 Kelly v. Taylor, 5, 598.
 — v. Natoma Co., 1, 592.
 Kelsey v. Northern Light Co., 18,
 497.
 Kemble Co. v. Scott, 9, 80.
 Kennedy v. Schwartz, 2, 679.
 Kent v. Quicksilver Co., 4, 47.
 Ketchum v. Barber, 15, 878.
 Keyes v. Little York Co., 14, 95.
 Keystone Co. v. Gallagher, 9, 406.
 Kidd v. Laird, 4, 571.
 Kielley v. Belcher Co., 10, 3, 11.
 Kier v. Peterson, 8, 499.
 Kille v. Ege, 12, 654.
 Kimball v. Gearhart, 1, 615.
 Kimmins v. Wilson, 2, 159.
 King v. Amy & Silversmith Co.,
 16, 83.
 — v. Edwards, 4, 480.
 — v. Randlett, 5, 605.
 Kinney v. Cons. Virginia Co., 10,
 457.
 Kinsman v. Jackson, 6, 852.
 Kirk v. Hartman, 11, 450.
 Knarborough v. Belcher Co., 12,
 155.
 Knowlton v. Culver, 12, 682.
 — v. Sewall, 2, 591.
 Koch's Appeal, 4, 151.
 Kraber's Appeal, 9, 127.
 Kramer v. Settle, 9, 561.
 Kreutz v. McKnight, 6, 814.
 Krum v. Mersher, 15, 415.
 Kuhn v. McAllister, 14, 512.
 Kuhn's Appeal, 8, 255.

 La Crosse Co. v. Scudder, 1, 446.
 Ladd v. Cartwright, 13, 607.

 Lady Bryan Co. v. Lady Bryan Co.,
 7, 478.
 Laffin Co. v. Sinsheimer, 2, 167.
 Laird v. Boyle, 12, 82.
 — v. Waterford, 6, 280.
 Lake Superior Co. v. Erickson, 10,
 89.
 Lallerstedt v. Griffin, 2, 128.
 Lamb v. Gaston Co., 1, 881.
 Lambert v. Fuller, 3, 202.
 Lampe v. Kennedy, 2, 266.
 Lansdale v. Ives, 15, 824.
 Laubach v. Laubach, 10, 177.
 Law v. Grant, 7, 56.
 Lawrence's Appeal, 7, 542.
 Lawrence v. Robinson, 12, 387.
 Leadville Co. v. Fitzgerald, 4, 390.
 Leaming v. Wise, 7, 41.
 Leavers v. Cleary, 2, 618.
 Leet v. John Dare Co., 4, 487.
 Lee v. Stahl, 16, 152.
 Le Fevre v. Carr, 8, 477.
 — v. Castagnio, 11, 579.
 Legge v. Legge, 15, 130.
 Leggatt v. Stewart, 15, 358.
 Lehigh Co. v. Harlan, 8, 423.
 — v. Jones, 10, 30.
 Leigh Co. v. Independent Co., 12, 97.
 Leitham v. Cusick, 7, 546.
 Lenfers v. Henke, 5, 67.
 Lentz v. Victor, 12, 211.
 Leonard v. Peeples, 6, 538.
 Levaroni v. Miller, 12, 232.
 Lewis v. Fothergill, 15, 271.
 — v. James, 15, 649.
 — v. Marsh, 8, 14.
 Lincoln v. Rodgers, 14, 79.
 Linn v. Cook, 2, 49.
 Litchfield Co. v. Taylor, 10, 634.
 Little Gunnell Co. v. Kimber, 1,
 536.
 Little Pittsburg Co. v. Little Chief
 Co., 15, 635.
 Little Schuykill Co. v. Richards,
 10, 661.
 Live Yankee Co. v. Oregon Co., 12,
 94.
 Livingston v. Moingona Co., 10, 698.
 Livingstone v. Rawyards Co., 10,
 291.

Lockhart v. Rollins, 16, 16.
 Lockwood v. Lunsford, 7, 582.
 Locust Co. v. Gorrell, 5, 129.
 Logan v. Dils, 14, 662.
 — v. Driscoll, 6, 172.
 — v. Green, 10, 822.
 — v. Washington County, 14, 108.
 Lombardo v. Ferguson, 5, 588.
 London, Bishop of v. Web, 7, 247.
 Lonkey v. Succor Co., 1, 411.
 Lonsdale v. Curwen, 7, 698.
 Lord Mountjoy's Case, 9, 175.
 Lord v. Carbon Iron Mfg. Co., 15, 695.
 Lorimier v. Lewis, 12, 487.
 Lovering v. Buck Mt. Co., 12, 585.
 Luckhart v. Ogden, 2, 601.
 Lumaghi v. Neuber, 8, 125.
 Lunsford v. LaMotte Co., 9, 308.
 Lupton v. White, 2, 430.
 Lycoming Co. v. Schwenk, 8, 53.
 Lyell v. Sanbourn, 1, 813.
 Lykens Valley Co. v. Dock, 8, 570.
 Lynn's Appeal, 15, 126.
 Lyon v. Gormley, 5, 883.
 — v. Miller, 10, 85.
 — v. Woodman, 7, 498.
 Macbryde v. Weeks, 13, 346.
 Maeris v. Bicknell, 1, 601.
 Magnet Co. v. Page Co., 7, 540.
 Mahony Co. v. Bennett, 7, 188.
 Maine Boys' Tunnel Co. v. Boston Co., 12, 247.
 Mallett v. Uncle Sam Co., 1, 17.
 Mammoth Co's Appeal, 7, 460.
 Mandlebaum v. North American Co., 5, 506.
 Manganese Co. v. Trotter, 8, 182.
 Manning v. Frazier, 8, 307.
 Mansfield v. Blackburne, 6, 86.
 Manville v. Parks, 15, 565.
 Mare v. Charles, 2, 124.
 Marker v. Kenrick, 2, 98.
 Marquart v. Bradford, 5, 523.
 Marston v. Simpson, 13, 86.
 Marsh v. Holley, 14, 687.
 Marshall S. M. Co. v. Kirtley, 16, 6.

Martin v. Browner, 1, 613.
 — v. Porter, 10, 74.
 Marvin v. Brewster Co., 13, 40.
 Marye v. Strouse, 2, 294.
 Mason v. Norris, 11, 140.
 Massey v. Davies, 1, 247.
 Massot v. Moses, 8, 607.
 Mateer v. Brown, 7, 156.
 Mather v. Trinity Church, 14, 472.
 Maturin v. Tredinnick, 13, 15.
 Maule v. Crawshaw, 11, 223.
 Maute v. Gross, 11, 123.
 Mawson v. Fletcher, 14, 657.
 Maye v. Yappen, 10, 101.
 Mayer v. Child, 13, 399.
 Mays v. Dwight, 10, 453.
 Mead v. Hamond, 9, 672.
 Meeker v. Chicago Co., 10, 202.
 Mellors v. Shaw, 9, 678.
 Melton v. Lambard, 14, 695.
 Merced Co. v. Fremont, 7, 309, 313.
 Mercer Co. v. McKee, 5, 581.
 Merrick v. Peru Co. 8, 588.
 Merrimac Co. v. Bagley, 13, 461.
 — v. Levy, 13, 467.
 Merrimack Co. v. Quintard, 2, 346.
 Merritt v. Judd, 6, 62.
 Metcalf v. Prescott, 16, 187.
 Mexborough v. Bower, 2, 92.
 Mexican & S. A. Co., *In re* 2, 86.
 Mexican Mill v. Yellow Jacket Co., 11, 175.
 Meyendorf v. Frohner, 5, 559.
 Meyers v. Farquharson, 3, 217.
 Miller v. Chester Slate Co., 16, 288.
 — v. Hartford Co., 8, 353.
 — v. Mickel, 15, 855.
 — v. Sparks, 6, 231.
 — v. Taylor, 9, 547.
 Milroy v. Spurr Mt. Co., 12, 53.
 Mine Hill Co. v. Lippincott, 12, 555.
 Missouri Co. v. Cochran, 10, 309.
 Mitchell v. Dors, 7, 250.
 — v. Hagood, 1, 506.
 Mokelumne Co. v. Woodbury, 12, 6.
 Money v. Lower Vein Coal Co., 10, 56.

- Monroe v. Northern Pac. Co., 2, 659.
 Montana Co. v. Clark, 16, 80.
 Mont Blanc Co. v. Debour, 15, 286.
 Moody v. McDonald, 2, 187.
 Moore v. Ferrell, 7, 281.
 — v. Smaw, 12, 418.
 — v. Thompson, 1, 221.
 — v. Valentine, 6, 112.
 More v. Massini, 7, 455.
 Morenhaut v. Wilson, 1, 52.
 Morgan v. McKee, 8, 128.
 — v. Negley, 7, 653.
 — v. Powell, 10, 79.
 — v. Skiddy, 7, 74.
 Moritz v. Lavelle, 16, 236.
 Morris v. De Witt, 12, 680.
 — v. Smith, 6, 22.
 Morrison v. Gold Co., 13, 578.
 Morrow v. Waltz, 2, 520.
 Morton v. Nebraska, 12, 451.
 — v. Solambo Co., 4, 468.
 Moss v. Livingston, 2, 119.
 — v. Oakley, 12, 1.
 — v. Rossie Co., 1, 289.
 Mountain King Lode v. Little Chicago Lode, 13, 299.
 Mount Diablo Co. v. Callison, 9, 616.
 Mountjoy's Case, 9, 175.
 Moxon v. Wilkinson, 12, 602.
 Moyers v. Tiley, 8, 474.
 Muhlenberg v. Henning, 15, 423.
 Munn v. Stone, 18, 102.
 Munro v. King, 12, 160.
 Munroe v. Ivie, 8, 127.
 Munson v. Tryon, 7, 469.
 Murley v. Ennis, 12, 660.
 Murphy v. Cobb, 5, 330.
 Murray v. Haverty, 14, 825.
 Musier v. Trumbour, 11, 260.
 Myers v. South Feather River Co., 2, 541; 4, 566.
 — v. Spooner, 9, 519.
 McAleer v. McMurray, 6, 606.
 McAndrews v. Tippet, 14, 618.
 McBee v. Loftis, 8, 222.
 McBrayer v. Hardin, 7, 288.
 McCabe v. Burns, 6, 665.
 McCahan v. Wharton, 16, 289.
 McCarron v. O'Connell, 14, 429.
 McCauley v. McKeig, 16, 1.
 McClelland v. Snider, 2, 531.
 McClintock v. Bryden, 12, 443.
 McCormell v. Denver, 11, 433.
 McCormick v. Horan, 5, 154.
 — v. Rossi, 15, 463.
 — v. Varnes, 9, 505.
 McCullough v. Moss, 18, 440.
 McCurdy v. Alpha Co., 8, 278, 286.
 McDonald v. Askew, 1, 660.
 — v. Bear River Co., 1, 626, 639.
 McDowell v. Hendrix, 9, 96.
 — v. Simms, 6, 476.
 McEvoy v. Hyman, 15, 300, 397.
 McGarrahan v. New Idria Co., 11, 641, 665.
 McGarrity v. Byington, 2, 311.
 McGee v. Stone, 2, 238.
 McGillivray v. Evans, 11, 209.
 McGinnis v. Egbert, 15, 329.
 McGoon v. Ankeny, 1, 9.
 McGowan v. La Plata Co., 10, 52.
 McGraw v. Fletcher, 15, 98.
 McHose v. Fulmer, 10, 173.
 McKeon v. Bisbee, 2, 809.
 McKinley v. Wheeler, 16, 65.
 McKinney v. Smith, 1, 650.
 McKnight v. Ratcliff, 11, 384.
 — v. Kreutz, 6, 305.
 McLaughlin v. Kelly, 7, 445.
 — v. Powell, 10, 424.
 McLean v. Blue Point Co., 12, 22.
 McLean Co. v. Lennon, 10, 277.
 — v. Long, 10, 198.
 National Co. v. Powers, 1, 234.
 Natoma Co. v. Bugbey, 13, 211.
 — v. McCoy, 4, 590.
 Neall v. Hill, 1, 80.
 Neel v. Neel, 14, 363.
 Neldon v. Smith, 2, 870.
 Nelson v. O'Neal, 4, 275.
 Neumoyer v. Andreas, 9, 293.
 Nevada W. Co. v. Powell, 4, 253.
 New Boston Co. v. Pottsville Co., 5, 118.
 New Jersey Co. v. Ames, 10, 436.
 New York Mine v. Citizens Bank, 2, 171.
 — v. First Nat. Bank, 1, 453.
 Newton v. Nock, 7, 611.

- Nicholls v. Diamond, 2, 121.
 Nicklin v. Williams, 18, 650.
 Nisbet v. Nash, 11, 531.
 Noble v. Sylvester, 12, 62.
 Nolan v. Lovelock, 9, 860.
 Norris v. Tayloe, 1, 868.
 Northam v. Bowden, 14, 485.
 North Georgia Co. v. Latimer, 12, 867.
 North Noonday Co. v. Orient Co., 9, 524, 529.
 North Pa. Co. v. Snowden, 14, 394.
 Noteware v. Sterns, 4, 650.
 Noyes v. Mantle, 15, 611.
 No. 5 Co. v. Bruce, 8, 146.

 O'Donnell ads. Brehen, 18, 397.
 Offerman v. Starr, 10, 614.
 Ogle's Estate, *In re*, 7, 199.
 Oil Co. v. Petroleum Co., 12, 570.
 Oil Creek Co. v. Penna. Co., 2, 491.
 O'Keeffe v. Cunningham, 9, 451.
 Old Telegraph Co. v. Central Co., 7, 535.
 Oliphant v. Woodburn Coal Co., 15, 865.
 Omaha Co. v. Tabor, 16, 184.
 Omar v. Soper, 15, 496.
 Ophir Co. v. Carpenter, 4, 640, 653.
 Oreamuno v. Uncle Sam Co., 1, 82.
 Oregon Co. v. Trullenger, 4, 247.
 Orr v. Haskell, 4, 492.
 Osgood v. Eldorado Co., 5, 87.
 Outram v. Morewood, 5, 484.
 Overman Co. v. American Co., 2, 251.
 — v. Corcoran, 1, 691.
 Owings v. Emery, 8, 887.

 Pacific Coast M. Co. v. Fick, 16, 75.
 — v. Spargo, 16, 75.
 Packer v. Heaton, 4, 447.
 Page v. Parker, 6, 544.
 — v. Summers, 15, 617.
 Palmer v. Williams, 14, 579.
 Pardee v. Murray, 15, 615.
 Parke v. Kilham, 4, 522.
 Parker v. Parker, 12, 596.
 Parrott v. Byers, 18, 505.

 Partridge v. McKittney, 1, 185.
 — v. Scott, 18, 640.
 Patton v. Axley, 8, 472.
 Patterson v. Hitchcock, 5, 542.
 — v. Keystone Co., 13, 169, 171.
 — v. Silliman, 11, 327.
 Paull v. Halferty, 9, 149.
 Paxton v. Bacon Co., 8, 512.
 Payne v. Elliott, 14, 515.
 Pearson v. Martin, 15, 95.
 Pease v. Brown, 8, 46.
 Peddie v. Donnelly, 2, 157.
 Pell v. Shearman, 10, 89.
 Pence v. Langdon, 13, 82.
 Penniman v. Winner, 2, 448.
 Pennsylvania Coal Co. v. Costello, 15, 47.
 — v. Owens, 12, 200.
 — v. Sanderson, 11, 79.
 Pennsylvania Lead Co.'s Appeal, 11, 84.
 People v. Black Diamond Co., 14, 162.
 — v. Bogart, 12, 512.
 — v. Judge of Marquette County, 15, 142.
 — ex rel. v. Pittsburg Co., 12, 518.
 — v. Williams, 4, 185.
 Perkins v. Prout, 2, 189.
 — v. Rice, 18, 8.
 Perley v. Langley, 4, 235.
 Perry v. Atwood, 8, 440.
 — v. Ricketts, 9, 687.
 Peterson v. Whitebreast Co., 11, 1.
 Pharis v. Muldoon, 15, 848.
 Phelan v. Hazard, 12, 41.
 Philadelphia Co. v. Taylor, 5, 133.
 Phillips v. Homfray, 14, 677.
 — v. Jones, 2, 522; 8, 344.
 — v. Reeder, 11, 419.
 Phillpotts v. Blasdel, 4, 341.
 Phipps v. Hully, 15, 350.
 Phenix Co. v. Lawrence, 12, 261.
 Phoenix Co. v. Fletcher, 15, 185.
 Pierce v. Bucklin, 12, 840.
 — v. Pierce, 15, 675.
 Pinch v. Anthony, 2, 598.
 Pittsburg Co. v. Foster, 10, 116.
 — Greenwood 12, 128.

- Plant v. Stott, 6, 175.
 Pollard v. Clayton, 13, 334.
 — v. Shively, 2, 229.
 Pool v. Lewis, 5, 523.
 Porterfield's App., 11, 142.
 Poughkeepsie Co., *In re*, 12, 552.
 Powell v. Burroughs, 8, 531.
 — v. Reese, 5, 676.
 Pralus v. Jefferson Co., 12, 473.
 — v. Pacific Co., 12, 478.
 Pratt v. Bank, 13, 590.
 — v. Taunton Co., 13, 590.
 Prendergast v. Turton, 8, 167.
 Prescott v. Wells, 6, 89.
 Pretty v. Solly, 8, 301.
 Price v. Griffith, 13, 330.
 Priest v. Union Co., 4, 515.
 Pringle v. Taylor, 2, 453.
 Proctor v. Jennings, 4, 265.
 Proprietors Mexican Mill v. Yellow Jacket Co., 11, 175.
 Prosser v. Parks, 4, 452.
 Proud v. Bates, 15, 227.
 Putnam v. Smith, 13, 63.

 Quarrington v. Arthur, 15, 255.
 Quicksilver Co. v. Hicks, 11, 93.
 Quincy Co. v. Hood, 12, 143.
 Quirk v. Falk, 2, 19.

 Raffetto v. Fiori, 14, 469.
 Ralph v. Harvey, 11, 273.
 Ralston v. Plowman, 5, 160.
 Ramsey v. Chandler, 4, 240.
 Randolph v. Halden, 9, 29.
 Randolph Co. v. Elliott, 3, 63.
 Ray v. Hodge, 15, 371.
 Real del Monte Co. v. Pond Co., 7, 452.
 Reamer v. Nesmith, 5, 610.
 Reaves v. Ore Knob Co., 3, 369.
 Reddington v. Henry, 3, 31.
 Redington v. Chase, 2, 439.
 Redmayne, v. Forster, 10, 551.
 Reed v. Spicer, 4, 330.
 Reese v. Jackson, 5, 615.
 Reese River Co., *In re*, 13, 19.
 — v. Atwell, 6, 626.
 Reg. v. Barrett, 4, 171.
 — v. Bleasdale, 4, 177.

 Reg. v. Haines, 4, 174.
 — v. Hughes, 4, 182.
 — v. James, 4, 163.
 — v. Lowe, 4, 180.
 Reid v. Barnhart, 11, 312.
 Renshaw v. Switzer, 15, 345.
 Renton v. Maryott, 10, 564.
 Rex v. Batt, 4, 162.
 — v. Bykerdike, 4, 161.
 — v. Sedgley, 10, 390.
 — v. Webb, 4, 166.
 Reynolds v. Hosmer, 4, 657; 5, 6.
 — v. Hall, 4, 116.
 — v. Iron Silver Co., 15, 591.
 Rhea v. Tatham, 11, 321.
 — v. Vannoy, 11, 315.
 Rhoades v. Patrick, 2, 62.
 Rhynd v. Hyndman, 3, 166.
 Rice's Appeal, 3, 633.
 Rice v. Boston Corp., 2, 419.
 — v. Ege, 16, 179.
 Rich v. Davis, 11, 326.
 — v. Johnson, 1, 173.
 Richards v. Harvey, 11, 273.
 — v. Schlegelmich, 3, 73.
 Richardson v. Kier, 4, 612.
 — v. McNulty, 1, 11.
 Richmond Co. v. Eureka Co., 9, 634.
 Ricketts v. Bennett, 11, 273.
 Riddle v. Brown, 9, 219.
 Ridgway v. Sneyd, 3, 414.
 Rigney v. Small, 8, 217.
 Risto v. Harris, 15, 53.
 Rivers v. Burbank, 7, 533.
 Roach v. Gray, 4, 450.
 Roberts v. Dauphin Bank, 6, 54.
 — v. Eberhardt, 11, 301.
 — v. Rose, 14, 441.
 — v. Wilson, 4, 493.
 Robert's Appeal, 10, 560.
 Robertson v. Jones, 10, 190.
 — v. Smith, 7, 196.
 Robinson v. Black Diamond Co., 14, 93.
 — v. Imperial Co., 10, 370.
 — v. Smith, 3, 443.
 Rochester Co. v. Hughey, 4, 263.
 Rockwell v. Graham, 15, 299.
 Rodgers v. Love, 2, 474.

- Rogers v. Cooney, 14, 85.
 — v. R. E. Lee Co., 2, 71.
 — v. Soggs, 14, 875.
 Rokeby v. Elliot, 8, 651.
 Rolleston v. New, 8, 464.
 Roosevelt v. Dale, 6, 877.
 — v. Fulton, 6, 877.
 Rose Clare Co. v. Madden, 8, 42.
 Roseville Alta M. Co. v. Iowa
 Gulch Co., 16, 98.
 Rosenthal v. Ives, 15, 824.
 Ross v. Heintzen, 12, 483.
 — v. Heathcock, 8, 404.
 Rosse v. Wainman, 10, 896.
 Rough v. Simmons, 15, 298.
 Rousseau v. Hall, 4, 116.
 Rowe v. Bacigallupi, 5, 287.
 — v. Bradley, 14, 431.
 — v. Grenfel, 18, 284.
 Rowlands v. Evans, 9, 644.
 Rule v. Jewell, 8, 291.
 Rupley v. Welch, 4, 243.
 Russell v. Chumassero, 15, 508.
 — v. Ford, 1, 75.
 Rutland Co. v. Ripley, 8, 291.
 Rylands v. Fletcher, 6, 129.
 Rynd v. Rynd Farm Co., 5, 275.

 St. Helen's Co. v. Tipping, 11, 50.
 St. John v. Kidd, 4, 454.
 St. Louis Co. v. Kemp, 11, 678.
 — v. Tierney, 2, 891.
 San Buenaventura Co. v. Vassault,
 18, 550.
 San Felipe Co. v. Belshaw, 5, 815.
 Saunders' Case, 15, 109.
 Sanderson v. Pa. Coal Co., 11, 60.
 Santa Clara Ass'n v. Meredith, 4, 44.
 Sargent v. Linden Co., 3, 207.
 Saterfield v. Randall, 1, 219.
 Savage v. Ball, 2, 579.
 Sawyer v. Turner, 16, 260.
 Sayer v. Pierce, 1, 72.
 Schaefer v. Bidwell, 1, 409.
 Schissler v. Chesshire, 5, 809.
 Schuylkill Co. v. Schmoele, 7, 480.
 Scorpion Co. v. Marsano, 12, 502.
 Scott v. Baker, 2, 145.
 — v. Clark, 12, 276.
 — v. Kittanning Co., 8, 159.

 Scranton v. Phillips, 14, 48.
 Seaman v. Vawdrey, 18, 62.
 Searight v. Payne, 18, 401.
 Searle v. Lackawanna Co., 5, 353.
 Sears v. Collins, 12, 400.
 — v. Taylor, 5, 818.
 Sedgwick v. Daniell, 11, 337.
 Sellers v. Phoenix Iron Co., 15, 338.
 Senhouse v. Harris, 8, 507.
 Senior v. Ward, 10, 646.
 Settembre v. Putnam, 11, 425.
 Seymour v. Wood, 1, 62.
 Shafer v. Constans, 1, 147.
 Shaffer v. Union M. Co., 15, 59.
 Shafto v. Johnson, 15, 262.
 Sharpe v. Arnott, 10, 580.
 — v. Dawes, 13, 576.
 — v. Wright, 8, 202.
 Shaver v. Bear River Co., 2, 537.
 — v. Ocean M. Co., 2, 130.
 Shaw v. Stenton, 8, 488.
 — v. Wallace, 14, 420.
 Shay v. Tuolumne Co., 5, 587.
 Sheets v. Allen, 11, 16.
 Sheldon v. Davey, 8, 581.
 Shepler v. Scott, 2, 674.
 Sheriff v. Globe Oil Co., 13, 475.
 Sherman v. Clark, 7, 488.
 Sherwood v. Meadow Valley Co.,
 18, 547.
 Shoenberger v. Baker, 14, 412.
 — v. Lyon, 18, 88.
 Sholl v. Peo., 4, 228.
 Short v. Stevenson, 6, 629.
 Sierra Nev. Co. v. Sears, 7, 549.
 Silsby v. Trotter, 8, 187.
 Silver Cord Co. v. McDonald, 16,
 171.
 Silver M. Co. v. Fall, 5, 283.
 Simons v. Vulcan Oil Co., 6, 633.
 Simpkins v. Smith & Parmelee Co.,
 12, 589.
 Sims v. Smith, 13, 161.
 Skidmore v. Eikenberry, 15, 360.
 Skillman v. Lachman, 11, 381.
 Skyrme v. Occidental Co., 9, 370.
 Slade v. Sullivan, 7, 419.
 Slater v. Haas, 16, 201.
 Slavonian Co. v. Perasich, 1, 541.
 Slemmer's Appeal, 11, 437.

- Sloan v. Lawrence Furnace Co., 5, 659.
 Small v. Franklin Co., 2, 83.
 Smallhouse v. Kentucky Co., 9, 888.
 Smart v. Morton, 18, 655.
 Smith's Case, 18, 19.
 Smith, *In re*, 9, 650.
 — v. Bellows, 12, 157.
 — v. Bolles, 16, 159.
 — v. Darby, 18, 695.
 — v. Doe, 5, 218.
 — v. Fagan, 1, 87.
 — v. Fletcher, 6, 193.
 — v. Kenrick, 6, 142.
 — v. Maine Boys T. Co., 18, 460.
 — v. Morris, 8, 817.
 — v. North Am. Co., 18, 599.
 — v. O'Hara, 1, 671.
 — v. Oxford Co., 2, 208.
 — v. Reese River Co., 12, 415.
 — v. Reynolds, 2, 227.
 — v. Richardson, 1, 139.
 — v. Rome, City of, 7, 806.
 — v. Wilmington Co., 5, 679.
 Sneathen v. Grubbs, 4, 286.
 Snodgrass v. Ward, 4, 306.
 Snow v. Thompson Co., 3, 15.
 Snyder v. Burnham, 15, 562.
 Sobey v. Thomas, 4, 359.
 Southern Devel. Co. v. Silva, 15, 485.
 Southern Cross Co. v. Europa Co., 9, 513.
 South Mountain Co. *In re*, 18, 615.
 South of Ireland Co. v. Waddle, 8, 538.
 Sowden v. Idaho Q. Co., 2, 199.
 Sparrow v. Strong, 2, 820.
 Spencer v. Kunkle, 2, 18.
 — v. Scurr, 10, 888.
 — v. Winselman, 2, 834.
 Stambaugh v. Smith, 15, 82.
 Stanley v. Little Pittsburg Co., 14, 214.
 Stapleton v. Pease, 9, 574.
 State v. Berryman, 4, 199.
 — v. Burt, 4, 190.
 — v. Curtis, 3, 630.
 — v. Eureka Co., 14, 165.
 — v. Guerrero, 9, 660.
 State v. Kruttschnitt, 14, 130.
 — v. Lady Bryan Co., 3, 523.
 — v. Manhattan Co., 14, 149.
 — v. Moore, 14, 110.
 — v. Northern Belle Co., 14, 211.
 — v. Pettineli, 12, 513.
 — v. Randolph Township, 14, 103.
 — v. Real del Monte Co., 4, 334.
 Steel v. Gold L. G. Co., 15, 292.
 — v. Solid Silver Co., 3, 155.
 — v. Dunne, 12, 89.
 Stenger v. Edwards, 9, 368.
 Stephenson v. Wilson, 13, 403.
 Steves v. Carson, 16, 12.
 Stevens v. Gill, 1, 576.
 — v. Guppy, 13, 315.
 — v. Murphey, 4, 330.
 — v. Williams, 1, 557; 5, 449; 1, 566.
 Stewart's Appeal, 12, 491.
 Stewart v. Chadwick, 13, 236.
 — v. Mahoney Co., 4, 106.
 — v. Munford, 5, 555.
 Stiles v. Laird, 11, 21.
 Stith v. Lookabill, 14, 588.
 Stoakes v. Monroe, 2, 246.
 Stockbridge Co. v. Cone Iron Works, 6, 317.
 — v. Hudson Iron Co., 13, 120.
 Stone v. Bumpus, 4, 271, 278.
 — v. Cartwright, 9, 672.
 — v. Geyser Co., 1, 59.
 — v. Marye, 13, 593.
 Stonecifer v. Yellow Jacket Co., 3, 4.
 Stoughton v. Leigh, 5, 47.
 Strahlendorf v. Rosenthal, 10, 676.
 Strang v. Ryan, 1, 48.
 Stratton v. Lyons, 10, 314.
 Strelley v. Pearson, 7, 618.
 Streeter v. Marshall Co., 7, 660.
 Strettell v. Ballou, 11, 220.
 Strong v. Lyon, 13, 554.
 Strout v. Natoma Co., 10, 330.
 Stuart v. White, 5, 454.
 Suffern v. Butler, 3, 22.
 Sullivan v. Hense, 9, 487.
 Sunday Lake Co. v. Wakefield, 16, 97.
 Susquehanna Co. v. Quick, 1, 201.

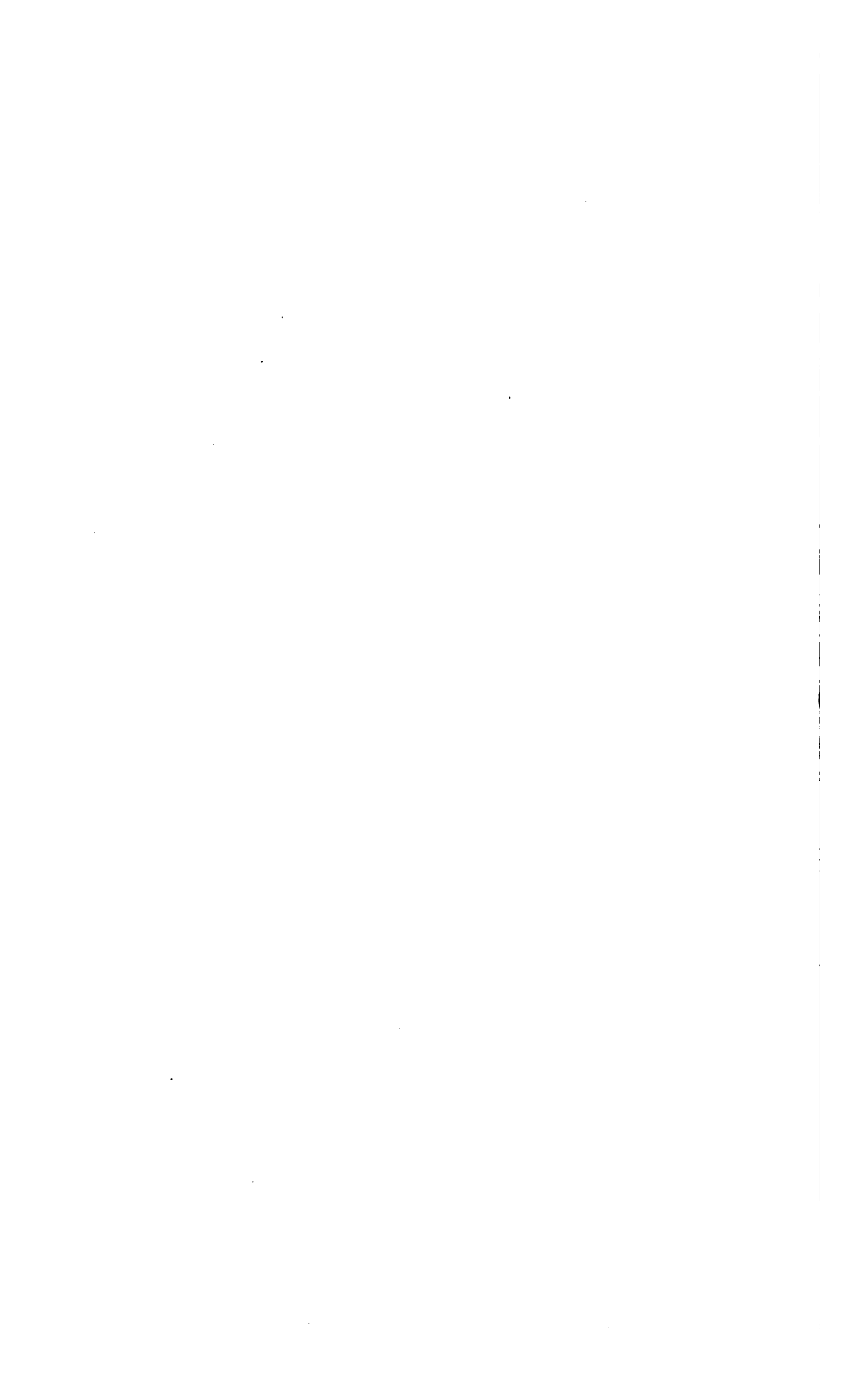
- Tabbart, *Ex parte* 9, 648.
 Table Mt. Co. v. Stranahan, 9, 457, 465.
 Tabor v. Dexter, 9, 614.
 Talbot v. Ford, 8, 847.
 Tartar v. Spring Creek Co., 14, 871.
 Tatham v. Lewis, 6, 670.
 Taylor v. Castle, 11, 484.
 — v. Holter, 8, 822.
 — v. Middleton, 15, 284.
 — v. New England Co., 12, 107.
 Tempest v. Ord, 2, 117.
 Tenney v. Miners Co., 11, 81.
 Territory v. Lee, 6, 248.
 Thomas v. Chisholm, 16, 122.
 — v. Oakley, 7, 254.
 Thomas Co. v. Allentown Co., 8, 86.
 Thompson v. Jewell, 12, 59.
 — v. Lee, 1, 610.
 — v. Noble, 11, 187.
 — v. Prouty, 12, 290.
 — v. Toland, 2, 77.
 Thorn v. Sweeney, 7, 564.
 Thornburgh v. Savage Co., 7, 667.
 Thorneycroft v. Crockett, 10, 529.
 Thorp v. Woolman, 8, 87.
 Tibbetts v. Moore, 9, 848.
 Tiffin, City of, v. McCormick, 2, 194.
 Tiley v. Moyers, 4, 820; 15, 259.
 Tipping v. St. Helen's Co., 11, 48, 49, 57.
 Tipton Co. v. Tipton Co., 10, 591.
 Titcomb v. Kirk, 5, 10.
 Titusville Works Appeal, 9, 17.
 Todd v. Cochell, 10, 655.
 Toombs v. Cons. Poe M. Co., 3, 210.
 — v. Hornbuckle, 18, 480.
 Townsend v. Peasley, 2, 612.
 Trafton v. Nougues, 8, 188.
 Treasurer v. Commercial C. Co., 13, 360.
 Tredwen v. Bourne, 11, 268.
 Trihay v. Brooklyn Lead Co., 15, 585.
 Trotter v. Maclean, 10, 268.
 Trout v. McDonald, 9, 82.
 Trowbridge v. Scudder, 8, 471.
 Troxell v. Lehigh Co., 5, 517.
 Tuck v. Downing, 7, 88.
 Tufts v. Plymouth Co., 1, 871.
 Tuolumne Co. v. Chapman, 11, 84.
 — v. Columbia Co., 10, 684.
 Turner v. Reynolds, 12, 190.
 — v. Tuolumne Co., 1, 107.
 Twaddell's Appeal, 7, 189.
 Twin Lick Co. v. Marbury, 8, 688.
 Union Co. v. Bliven Co., 3, 107.
 — v. Crary, 1, 196.
 — v. Dangberg, 8, 118.
 — v. Ferris, 8, 90.
 — v. Murphy's Flat Co., 8, 487.
 — v. Pierce, 12, 19.
 — v. Rocky Mt. Bank, 1, 482.
 — v. Taylor, 5, 823.
 United Merthyr Collieries Co. *In re*, 10, 153.
 United R. R. Co. v. Standard Co., 7, 625.
 United States v. Gear, 14, 403.
 — v. McGoon, 10, 84.
 — v. Marshall Silver Co., 16, 206.
 — v. Nelson, 14, 881.
 — v. Parrott, 7, 835.
 — v. Waitz, 4, 205.
 Upton v. Larkin, 15, 404.
 — v. Brazier, 9, 243.
 Utley v. Clark-Gardner Co., 4, 89.
 Valley Salt Co. v. Brown, 5, 897.
 Vanatta v. Brewer, 6, 358.
 Van Bokkelen v. Cook, 18, 421.
 Vandergrift's Appeal, 9, 397.
 Van Dusen v. Star Q. Co., 3, 26.
 Van Etten v. Eaton, 12, 12.
 Vansickle v. Haines, 15, 201.
 Van Valkenburg v. Huff, 9, 467.
 Van Zandt v. Argentine Co., 4, 441; 7, 684.
 Vermont Co. v. Windham Bank, 8, 812.
 Vervalen v. Older, 10, 540.
 Verzan v. McGregor, 2, 565.
 Vice v. Fleming, 11, 241.
 — v. Lady Anson, 11, 244.
 Vincent v. Watson, 18, 888.
 Virginia, City of v. Cholar Potosi Co., 14, 120.

- Von Schmidt v. Huntington, 6, 284.
 Voorhis v. Freeman, 6, 49.

 Wake v. Hall, 6, 119.
 Waldron v. Marsh, 7, 805.
 Walker v. Fletcher, 8, 1.
 — v. Tiffin Co., 10, 572.
 — v. Tucker, 8, 672.
 Wallace v. Silsby, 8, 890.
 Walling v. Miller, 7, 165.
 Wando Phosphate Co. v. Gibbon, 16, 55.
 Ward's Appeal, 5, 666.
 Wardell v. U. P. R. R., 7, 144.
 Waring v. Cram, 12, 280.
 — v. Crow, 5, 204.
 Warner v. Daniels, 6, 436.
 Washington Gas Co. v. Johnson, 16, 165.
 Washburn v. Alden, 1, 820.
 Waterman v. Porter, 15, 687.
 — v. Waterman, 15, 687.
 Waters v. Stevenson, 10, 240.
 Watson v. O'Hern, 8, 838.
 Watson C. Co. v. Casteel, 9, 130.
 Watts' Appeal, 8, 222.
 — v. Tibbals, 5, 662.
 — v. White, 18, 11.
 Weaver v. Conger, 6, 203.
 — v. Eureka Co., 1, 642.
 Webber v. Supervisors, 14, 175.
 — v. Reinhard, 14, 175.
 Weill v. Lucerne Co., 8, 872.
 Weimer v. Lowery, 4, 543.
 Weisman v. Smith, 11, 152.
 Weist v. Grant, 2, 28.
 Welland v. Huber, 13, 863.
 Wentworth v. Cock, 2, 470.
 — v. Turner, 7, 249.
 Wesley Co. v. Healer, 1, 63.
 West v. Lanier, 12, 184.
 Westcott v. Minnesota Co., 6, 886.
 West Cumberland Co. v. Kenyon, 15, 203.
 Westmoreland Coal Co's Appeal, 10, 394.
 West Point Co. v. Reymert, 7, 528.
 West Va. Co. v. Volcanic Co., 5, 889.
 Weston v. Alden, 8, 82.
 Whaley v. Brancker, 8, 29.
 Whalley v. Ramage, 8, 52.
 Wheatley v. Baugh, 18, 574.
 — v. Chrisman, 11, 24.
 — v. Westminster Co., 8, 553.
 Wheeler v. Floral Co., 2, 622.
 — v. Garcia, 18, 481.
 — v. Johnson, 2, 642.
 Whitaker v. Brown, 5, 656.
 White v. Lupton, 2, 430.
 — v. Todd's Valley Co., 4, 536.
 — v. Toncray, 2, 463.
 Whiting v. Hill, 6, 692.
 Whitney v. Buckman, 10, 428.
 Whittingham v. Andrews, 5, 193.
 Wickersham v. Chicago Co., 5, 586.
 Wiggins v. McDonald, 2, 564.
 Wilcox v. Lucas, 3, 390.
 Wild v. New York Co., 1, 413.
 — v. Holt, 12, 182.
 — v. Milne, 11, 207.
 Wilkinson v. Proud, 12, 269.
 — v. Stafford, 14, 522.
 — v. Stewart, 18, 1.
 Williams v. Attenborough, 2, 410.
 — v. Bagnall, 13, 686.
 — v. Chicago Co., 1, 397.
 — v. Gibson, 16, 243.
 — v. Groucott, 13, 632.
 — v. Hanna, 15, 73.
 — v. Pomeroy Coal Co., 6, 195.
 — v. Rowlands, 9, 644.
 — v. Schmidt, 2, 23.
 — v. Spurr, 7, 17.
 — v. Summers, 15, 246.
 Willis v. Forney, 14, 389.
 Wilmington Co. v. Allen, 9, 106.
 — v. Lamb, 15, 56.
 Wilms v. Jess, 14, 56.
 Wilson v. Henry, 1, 152, 157.
 — v. Fitch, 9, 155.
 — v. Waddell, 14, 25.
 Winans v. Hassey, 2, 284.
 Winter v. Belmont Co., 13, 595.
 Wiseman v. McNulty, 6, 826.
 Wixon v. Bear River Co., 1, 650.
 Wolf v. Marsh, 8, 204.
 — v. St. Louis Co., 10, 636, 653.

Wolf Creek Co. v. Schultz, 8, 95.
Wolverton Co. v. Nichols, 15, 309.
Wolfley v. Lebanon Co., 18, 282.
Wood v. Morewood, 10, 77.
— v. Londonderry, 6, 464.
— v. Richardson, 12, 121.
Wood Hydraulic Co. v. King, 8,
618.
Woodbury v. DeLap, 12, 144.
— v. Deloss, 12, 144.
Woolman v. Garringer, 1, 675.
Worden v. Dodge, 2, 116.
Wren v. Kirton, 2, 408.
Wright v. Chestnut Co., 12, 528.
— v. Compton, 2, 189.
— v. Oroville Co., 8, 558.
— v. Rawson, 11, 8.

Wynkoop v. Seal, 18, 498.
Wyrley Co. v. Bradley, 2, 89.
Yahoola R. Co. v. Irby, 14, 460.
Yandes v. Wright, 14, 82.
Yankee Jim's Co. v. Creary, 1, 196.
Yellow Jacket Co. v. Stevenson,
8, 545.
Youghiogeny Co. v. Smith, 10, 189.
Youghiogeny Shaft Co. v. Evans,
8, 104.
Young v. Northern Co., 10, 596.
Youngman v. Linn, 2, 448.
Yunker v. Nichols, 8, 64.
Zeckendorf v. Hutchison, 9, 483.
Zollars v. Evans, 4, 407.



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